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APPENDIX

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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1970

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**No. 336**

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LOUIS S. NELSON, Warden, California State Prison  
at San Quentin, *Petitioner*,

vs.

JOE J. B. O'NEIL, *Respondent*.

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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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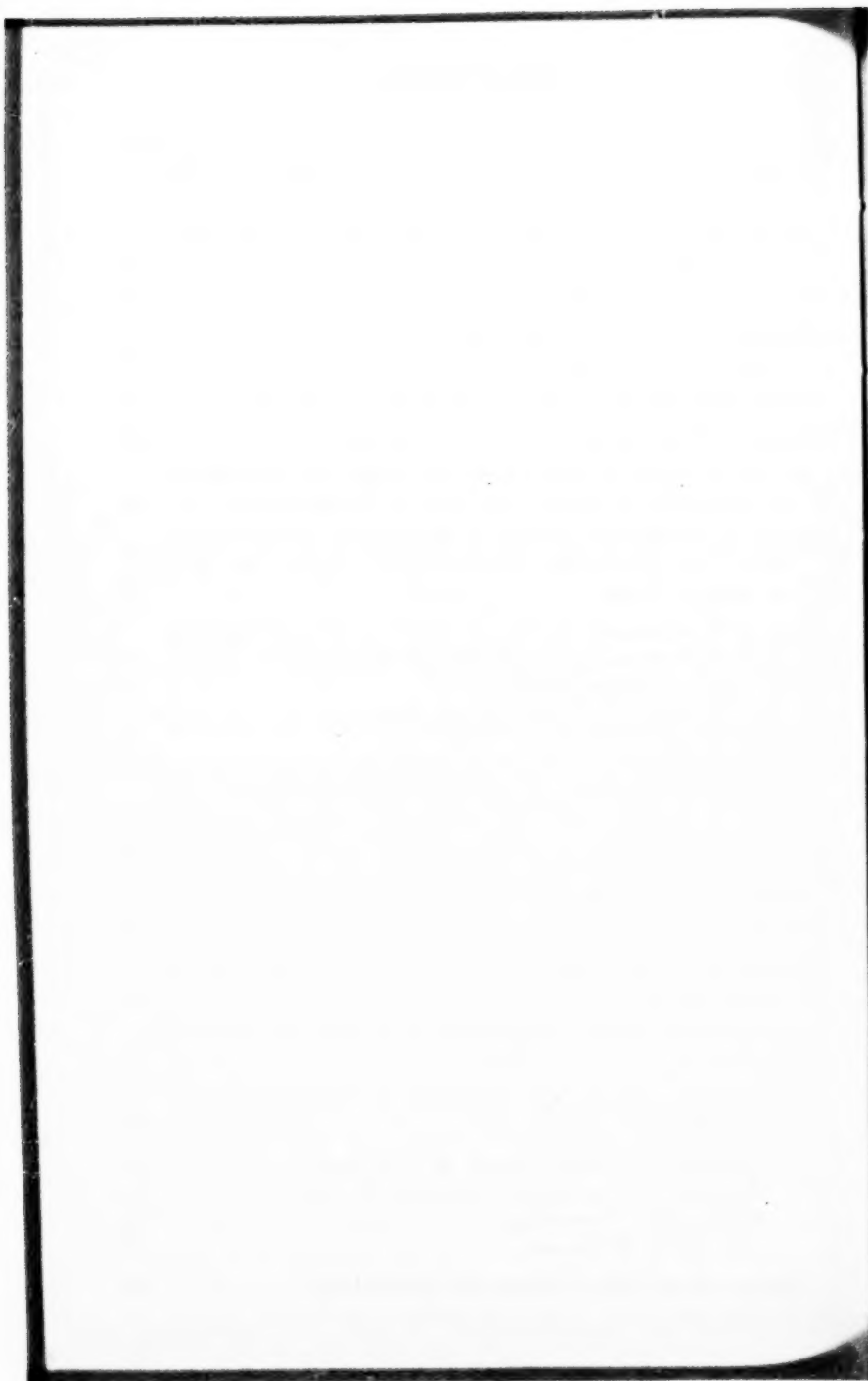
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**DOCKET ENTRIES**

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United States Court of Appeals  
for the Ninth Circuit

D. C. Judge Arthur Wollenberg

Notice of Appeal filed July 22, 1968

Civ-H.C. From USDC, Northern California

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JOE J. B. O'NEIL,

*Plaintiff-Appellee,*

vs.

LOUIS S. NELSON,

*Defendant-Appellant.*

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For Appellant:  
Appellee:  
in Pro Per

For Appellee:  
Appellant:  
Calif. Atty. Genl.

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Date	Appellant's Account	Balance Received	Disbursed
1968			
	12 State of Cal. (22504)	25.00	25.00
	4	65.00	40.00
		40.00	25.00
		30.00	10.00
	Victors'	7.70	22.00
	4 State of Cal		7.70
1970			
	Cert. Thomas Lynch (37741)	10.80	10.80
			10.80
14-68	Record to Victor—Rtd. 11-1	AUG. 27 1970	
	To Repro. AUG 2 1970	From Repro.	

Date	Filings—Proceedings
1968	
Aug. 12—	Filed certified typewritten record (1) volume —\$25.00
Aug. 12—	Filed original exhibits (State Court Transcripts) LPs—To S.C.
Oct. 1—	Docketed Cause and entered appearance of appellee in pro per
Nov. 1—	Filed two add'l copies of record: Clerk's Fee 118pp—10.00
Nov. 7—	Loaned copy of Vol. 1 to appellant—Ret'd 12/24
Dec. 24—	Filed orig & three of appls motion for entry of default, dismissal of appeal & enlargement of bail (to panel 1/6/68)
1969	
Jan. 20—	Filed order (C & M) denying appellees motion for entry of default etc.
April 11—	Cause submitted on briefs on file to BR D, CJJ & Solomon, DJ

## Date

## Filings—Proceedings

1970

- Jan. 26—Ordered opinion (Duniway - Solomon D.J. dis.) filed and judg. filed & ent.
- Jan. 26—Filed opinion. Judg. of DC Affirmed
- Jan. 26—Filed & ent. judgment
- Feb. 10—Recvd. appellants petition for rehearing & suggestion for rehearing en banc—awaiting directive from court re: filing & excess number of pages
- Feb. 19—Recvd. orig & 3 of applts pro per app for bail (to panel)
- April 23—Filed order (D Br & Solomon) granting leave to file petition for rehearing; further ordered that petition for rehearing be denied & suggestion for rehearing en banc be rejected.
- April 23—Filed order (D Br & Solomon) denying app for enlargement on bail or recognizance
- Apr 28—Rcvd applt app for stay of judg (circulating 4/28)
- April 29—Filed order April 27, 1970 (D, Br & Solomon) amending caption of order filed April 23, 1970
- Apr 29—Filed app & order (D) staying judg to May 23, 1970
- May 20—Recvd. applt. motion for ext. for stay of judg. (Circulating 5/20)
- May 21—Filed app. & order (D) ext. stay of judge. to June 20, 1970.
- June 1—Recvd. orig & 3 of appellee's opp to applts motion for ext of stay of mandate (D, Br & Solomon)

**Date****Filings—Proceedings****1970**

June 22—Recvd. orig. & 3 applts. application for ext. on stay of judge. to D.

June 23—Filed application & order (D) staying judgment to June 30, 1970. No further extensions will be granted

June 25—Recvd. orig & 3 applts. application for ext. on stay of judge. to D.

June 25—Issued certified copy of record to Clk, SC for certiorari—\$10.80

June 26—Filed application & order (D) ext. stay of judge. to July 2, 1970.

July 6—Recvd. notice from Clk, SC, re: filing pet for cert SC #336

July 7—Issued original exhibits (state ct. transcripts) to Clk, SC for purposes of certiorari

Nov. 16—Filed certified copy of SC order (11/9) granting certiorari

**DOCKET ENTRIES**

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Civil Docket  
United States District Court  
Jury demand date:

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49136

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Title of case

JOE J. B. O'NEIL

vs.

LOUIS S. NELSON, *Warden*

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Attorneys

For plaintiff: In Pro Per  
A-90909, Tamal, California

For defendant:

Atty. Genrl. State Calif. 6000 State Bldg. S.F. 2

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## STATISTICAL RECORD

J.S. 5 mailed APR 25 1969  
 (Costs - Clerk) (Date - 9-22-68 - JUL 23 1968)  
 (Name or Receipt No. - 11425 (appeal))  
 (Rec. - 5.00) (Disb. - 5.00)

J.S. 6 mailed JUL 30 1968  
 (Costs - Marshal)

Basis of Action: Petition for Writ of Habeas Corpus  
 (Costs - Docket fee)  
 (Costs - Witness fees)

Action arose at:  
 (Costs - Depositions)

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Date	Filings—Proceedings
Apr 25—	1. Filed Order Allowing Petitioner to file in Forma Pauperis (Wollenberg)
	2. Filed Petition for Writ of Habeas Corpus
	3. Filed Order to Show Cause, Returnable June 21, 1968 (Wollenberg)
May 17—	4. Filed return by resp. to O.S.C. (In file)
Jun 10—	5. Filed suppl. return by resp. to O.S.C.
Jun 13—	6. Filed 2nd suppl return by resp. to O.S.C.
Jun 21—	Ord., aft. hrg. resp., petn. for writ of hab. corp. stands submitted. (Wollenberg)
Jun 21—	7. Filed traverse by petnr. to return to O.S.C. (File to ACW)
Jun 27—	8. Filed "Petitioner's opposition to respondent's supplemental returns" (to ACW)

## Date

## Filings—Proceedings

July 12—

9. Filed order granting writ of habeas corpus; execution stayed for 10 days to allow respondent to appeal if no appeal is filed within the 10 day period it shall be further stayed until further order of this Court (Wollenberg)  
Copies mailed to A.G. & petitioner

July 22—

10. Filed petition for certificate of probable cause to appeal
11. Filed certificate of probable cause to appeal (Wollenberg)
12. Filed notice of appeal by respondent
13. Filed designation of record on appeal
14. Filed statement of pts on which appellant intends to rely

July 23—

Mailed clerks notice of filing notice of appeal

July 26—

15. Filed petitioners motion for temporary release with supporting papers attached. (Filed to Judge Wollenberg)

Aug 8—

16. Filed order denying petnr's. mo for "Temporary release" on his own recognizance pending disposition of resp's. appeal and/or re-trial (Wollenberg)

Aug 9—

Copies mailed to Petnr. And A.G.

Aug 9—

Made, Mailed Record on Appeal CCA

In the United States District Court for the  
Northern District of California

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Case No.

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Joe J. B. O'Neil

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

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PETITION FOR A WRIT OF HABEAS CORPUS

---

To: The Honorable Presiding Judge of the above  
entitled Court.

Comes Joe J. B. O'Neil, Petitioner in the above en-  
titled caption, with his claim of a constitutional viola-  
tion.

That he, the said Petitioner is unlawfully impris-  
oned, detained, confined and restrained of his liberty  
by the Warden, Louis S. Nelson, at San Quentin  
Prison in Marin County, State of California, by virtue  
of presently complained illegal judgment; and that the  
illegality thereof consist in this to wit:

*Jurisdiction*

Jurisdiction is conferred upon this Honorable Court  
pursuant to U.S.C.A. Title 18 . . . ; U.S.C. Title 28,  
2241; U.S.C. Title 2243; and U.S.C. Title 28, 2253..

### *Statement of the Case*

Your Petitioner is presently incarcerated pursuant to a judgment of conviction rendered by the Superior Court of the State of California, in and for Los Angeles County, on May 19, 1965, of the crimes of Robbery, (Penal Code, Sec., 211); Kidnapping for the purpose of robbery, (Penal Code, Sec. 209); and violation of Section 10851, Vehicle Code. (C.T. 1-4). Upon imposition of the terms prescribed by law, life, Petitioner was received by the California Correctional Authorities where he is presently confined.

### *Statement of Facts*

At approximately 1:00 a.m., February 9, 1965, Petitioner and co-defendant Runnels' were arrested by officer John O. Kirk, of the Culver City Police Department after being removed from a white 1956 Cadillac, which proved to belong to the victim, Mr. Vance Collins. The day following their arrest, co-defendant Runnels' made a complete confession to the crimes to officer Traphagen, naming Petitioner as the instigator and claiming that he had suggested that the two of them "make a couple of hits" and that it was Petitioner who actually carried out the robbery and kidnapping. He further confessed that when cruising around in the Cadillac, they were waiting for a favorable moment to perpetrate a robbery in a liquor store when arrested. (R.T. 103-104-105).

Vance Collins, the victim of the alleged crimes testified that on February 8, 1965, at approximately 10:30 p.m. he was sitting in his 1956 Cadillac on the

parking lot of a market at 3993 South Western Avenue, Los Angeles, (R.T. 10-11) when he was kidnapped by two men, directed to drive a few blocks, robbed of \$8.00 and then put out of the automobile. (R.T. 21)

The following day the victim was called to the police station and identified Petitioner as one of the men involved in the crimes. (R.T. 26-27). However, the victim testified as to the prevailing conditions during the alleged crimes. Upon entering the car, Petitioner immediately directed him to keep his eyes straight ahead and that upon this directive, he kept his eyes straight ahead throughout the time he was driving, until he was ordered out of the car. (R.T. 29-30-34-39-40). He got only one look at Petitioner as he entered the car. (R.T. 38).

He further testified that during the incident there was "not to much light, but you could see very good." (R.T. 32).

His description of Petitioner was a vital flaw. Initially, he noted that he "may have" described the suspect identified as Petitioner as approximately five feet tall, (R.T. 43-177) light complectioned, and wearing a hat. (R.T. 46). On the contrary, Petitioner testified that he was around five feet ten inches to five feet eleven inches tall. (R.T. 202). Secondly, the victim testified in regards to description, that at the lineup Petitioner may have been wearing a blue jacket and brown trousers . . . , "I'm not sure, to my knowledge." (R.T. 44-45). In relation to the lineup itself,

the victim testified that he was not sure how many men were in the lineup. That he believed three of the men were Negroes, but was not sure (R.T. 45) and could not say where Petitioner was standing. (R.T. 47).

On the day preceeding the trial defense counsel made motions as follows: "Mr. Black: Thank you, your Honor, I have a motion for severance of cause, your Honor, and this is—I desire that defendant O'Neil's case be separated from the co-defendant's case. This is based upon evidence which was learned by me yesterday, and I feel, your Honor, that if it is true that certain statements were made by the co-defendant, or should the same come into evidence—allegedly made by the co-defendant—it would prejudice defendant O'Neil, and so far as his defense and due process of law, your Honor, I believe that the statements will deny him a fair trial, and with that I submit it, your Honor."

Again, immediately before Runnels' confession was presented through the police officer's testimony, defense counsel motioned as follows: "Mr. Black: I also desire your Honor to strike the part of the conversation as it relates to the defendant O'Neil, in that defendant O'Neil was not there at the time to either affirm or deny the statements which allegedly were made at that time."

The Court: Your first motion to strike is denied, I will, however, instruct the jury that this conversation will be received only as against defendant Runnels'."

"Mr. Black: The second motion is in regard to defendant O'Neil. My second motion is that this conversation be stricken as to defendant O'Neil." The Court: Your motion to strike *any part* of the conversation is denied as far as being received in evidence. The jury will be instructed that it will be received only as against Mr. Runnels." (R.T. 3-4-5 and R.T. 94-95).

The evidence of co-defendant Runnels' confession was received through the testimony of officer Traphagen with the court's admonition to the jury that it was not to be considered as against Petitioner. (R.T. 102).

### *Arguments*

(I) Denial of the motion for severance of the cause deprived Petitioner of his requisite procedural rights to due process.

(II) In view of the equivocal identification, Petitioner's alibi defense could have proved effective had the statement been properly deleted.

For the defense, Lee Brooks testified that on February 8, around midnight, he observed Petitioner near 61st Street and Vermont Ave. sitting in a big white car. (R.T. 145-152). A man unknown to him went to the car and handed some keys to Petitioner or Runnels' and then Runnels' drove the car away. (R.T. 146-150-151). Loydean Mayfield, testified that on the night of February 8, Petitioner arrived at her home about 9:00 p.m. (R.T. 163) and did not leave until a little after 11:00 p.m. Mrs. Otha O'Neil, Petitioner's mother, whose testimony is set forth on pages 174 through 183

R.T., corroborated this testimony, and Petitioner himself testified in a similar vein. (R.T. 220).

### *Allegations*

The improper denial of the motion for severance of the trial, and the trial court's refusal to delete from the statement that conversation which related to Petitioner, are the contentions which Petitioner asserts under the 5th, 6th and 14th Amendments of the Federal Constitution, and Article I, Section 13, of the California Constitution.

### *Points and Authorities*

The authority necessitating judicial review is clearly expressed by Section 1473 of the Penal Code: "Every person unlawfully imprisoned, or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

The judicial rule denouncing the use of a defendant's confession against a non-confessing co-defendant has been long established practice in criminal cases. Thus, special emphasis must be placed on presentation of Runnels' confession. "Moreover, as we stated in *People v. Parham*, (1963) 69 Cal. 2d 378, 385 (33 Cal. Rptr. 497, 384 P. 2d 100), a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction."

It is not difficult to determine what effects Runnels' confession had on the jury. Without its use the evi-

dence was insufficient as a matter of law to convict Petitioner. The victim's equivocal identification of Petitioner amply support this fact. Because of the use of Runnels' confession at the trial, two factors worked against Petitioner. His alibi defense was nullified and the combined trials with the judge's failure to delete the confession, prejudiced him to such an extent as to deny him due process and equal protection of the law. See *People v. Dorado*, (1965) Ante, pp. —, — (42 Cal. Rptr. 169, 398 P. 2d 361); *People v. Stewart*, (1965) Ante, pp. —, — (43 Cal. Rptr. 201, 400 P. 2d 97): "And we have held that the erroneous admission of a confession is prejudicial per se and therefore compels reversal. See also *Witkin's Cal. Evidence* (1958) 275. Failure of the trial judge to sever the cause or to delete that conversation of Runnels' confession which related to Petitioner constituted erroneous admission of the confession.

In decisions consistent with the facts of this case, the Supreme Court observed (*People v. Aranda*, 63 Cal. 2d 518, 530-531) . . . The rules are, a separate trial for a non-confessing co-defendant unless (1) incriminating portions of the confession can be effectively deleted without prejudice to the confessing individual or (2) prosecutor's assurance the confession will not be used." *People v. Massie and Vetter*, State Supreme Court. Crim. 9506 (June 21, 1967): "In the confession the murderer referred to himself and the co-defendant either as "me and John" or "We" being the ones committing the crimes.

Absent federal constitutional compulsion, the test for "the prejudicial effect of an erroneous denial of

a separate trial under the harmless error rules" would be consideration of (A) particular errors identified, (B) significant differences occurring if a separate trial were granted and (C) the amount of guilt evidence, presented at the joint trial, the Supreme Court announced." So, here the alleged accomplice was prejudiced by being denied a separate trial, for it was reasonably probable he would have obtained a more favorable verdict if the trial judge did not have to exclude from his consciousness the inadmissible confession evidence of the accomplice being named driver of the getaway car. . . ." The trial judge's failure to sever the trials or to delete or determine if the conversation relating to Petitioner could be deleted, constituted error under *People v. Massie* and *Vetter*, supra, quoting: "Vetter contended that the court erred in denying his motion for separate trial. We explain that the judge committed error (1) in failing to exercise his discretion to consider relevant and long established reasons for granting a severance, and (2) in failing to order a separate trial under the rules announced in *People v. Aranda*, (1965) 63 Cal. 2d 518, 530, 531." Without determining if the confession could be properly deleted, the trial court erred by denying the motion for separate trial, where the motion was made one full day prior to the actual trial, where evidence of Petitioner's guilt had not been presented, yet where the confession loomed high as reason for granting the motion. See *Schaffer v. United States*, (1960) 362 U.S. 311; *Cross v. United States*, 331 F. 2d 85; *United States v. Thompson*, (4th Cir. 1940) 113 F. 2d 643, 646;

"Other courts have applied harmless error rules, but have held that improper denial of a separate trial is itself a miscarriage of justice, because (A) the result under the proper mode of trial cannot be guessed; (B) the record cannot be expected to reveal such hidden prejudicial effects of a joint trial as consideration against the defendant of evidence admitted only as against co-defendants, inhibition of the presentation of defense evidence, and guilt by association; and (C) the prejudicial impact of these effects cannot be measured, but may be assumed to be substantial." *People v. Massie and Vetter*, supra.

The federal courts have considered the denial of separate trials under similar situations as conjunctive to a constitutional violation and without regards for any particular prejudice resulting from the use of the confession, have reversed the conviction. *State v. Rosen*, (1949) 151 Ohio St. 339. "The failure of a trial court to grant a separate trial in a case tried before Rosen was held to be an abuse of discretion. In that case an incriminating extra-judicial confession was later admitted with appropriate limiting instructions; the conviction was reversed without further consideration of the particular prejudicial effect of the confession." See also *State v. Abbott* (1949) 131 Ohio St. 228, 239.

In *Cram v. United States* (4th Cir. 1959) 272 F. 2d 567, 570-571: "Just as rule 14 does not permit the government to circumvent the prohibition of Rule 8 (A), neither does the harmless error rule Rule 52 (A), have this effect. The error here was no mere

technicality. . . . It is not 'harmless error' to violate a fundamental procedural rule designed to prevent mass trials."

In *Cupo v. United States* (D.C. Cir. 1966) 359 F. 2d 990, 993; that court reversed a conviction after the trial court improperly denied defendant's motion for a separate. Therefore, the impossibility of the jury to exclude Runnels' incrimination statement from their consideration as to Petitioner's involvement in the alleged crime, must take precedence and should be given maximum consideration in accordance with relevant criteria. In *Delli Paoli v. United States* (1957) 164 U.S. 76, 78-81, the United States Supreme Court reversed the conviction of all the defendants because of the improper consolidation of trials, stating it cannot be said in such a case that all defendants may not have been embarrassed and prejudiced in their defense . . . Such consideration cannot help but be prejudicial. *Day v. State* (1950) 196 Md. 384, 395; *Stallard v. State* (1948) 187 Tenn. 418, 430; *State v. Desroche* (1895) 222 N.C. 344; *Flamme v. State* (1920) 171 Wis. 501-507: "Although many courts assume or infer prejudice from improper consolidation of trials, they nevertheless, in reaching the question of whether denials of severance was error, make a threshold examination of possible sources of actual prejudice. See for example, *United States v. Bozza* (2d Cir. 1966) 365 F. 2d 206; *Culjac v. United States* (9th Cir. 1931) 53 D. 2d 554. The dichotomy between the second and third approaches stated in the text is therefore not as great as might appear.

### *Conclusion*

The trial court therefore violated Petitioner's substantial right to protection against his co-defendant's incrimination confession. Such violation can't help but offend his constitutional right to due process and equal protection of the law. The trial judge made no effort to determine if co-defendant Runnels' confession could be deleted; it conducted no inquiry to determine the possible prejudice resulting from its presentment, but tended to neglect its obligation to Petitioner and constitutional provisions.

In relation to the facts and authorities herein contained, the conviction should be reversed and Petitioner granted a new trial.

Accordingly, it is for these reasons respectfully submitted by your Petitioner.

### *Prayer*

Wherefore, Petitioner prays that an order issue out of this court, directed to the Respondent, commanding him to release said Petitioner from any further restraint in the connection with said conviction, or in an alternative order a plenary hearing of the cause; in that a just finding will determine any further action concerning your Petitioner.

Subscribed and sworn to before me this 3 day of February, 1968.

/s/ Joe B. O'Neil  
Joe J.B. O'Neil  
P.O. Box A-90909  
Tamal, California 94964

United States District Court  
Northern District of California

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Case No. 49136

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PETITION FOR WRIT OF HABEAS CORPUS  
PERSONS IN STATE CUSTODY

---

Joe J. B. O'Neil, A-90909,	} Petitioner, Respondent.
Louis S. Nelson, Warden,	

*Instructions—Read Carefully*

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall be set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the *original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of California, San Francisco, California.

1. Place of detention: San Quentin Prison.
2. Name and location of Court which imposed sentence: Superior Court, Los Angeles County.
3. The indictment number or numbers (if known) upon which, and, the offense or offenses for which sentence was imposed:
  - (a) .....
  - (b) .....
  - (c) .....
4. The date upon which sentence was imposed and the terms of the sentence:
  - (a) May 19, 1965, Robbery 211; kidnapping for the purpose of robbery, 209; Vehicle Code, 10851, sentenced to life.
  - (b) .....
  - (c) .....
5. Check whether a finding of guilty was made:
  - (a) after a plea of not guilty: Yes.
  - (b) after a plea of nolo contendere: .....
  - (c) after a plea of guilty: .....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
  - (a) a jury: Yes.
  - (b) a judge without a jury: .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

8. If you answered "yes" to (7), list:

(a) The name of each court to which you appealed:

I. District Court of Appeal, Second Appellate District, Division One.

II. ....

III. ....

(b) The result in each such court to which you appealed:

I. Superior Court's conviction was affirmed.

II. ....

III. ....

(c) The date of each such result:

I. March 30, 1967.

II. ....

III. ....

(d) If known, citations of any written opinion or orders entered pursuant to such results:

I. The court ruled *People v. Aranda*, 63 Cal. 2d 518 (47 Cal. Rptr. 353, 407 P. 2d 265), non-retroactive to petitioner.

II. ....

III. ....

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) ....

(b) ....

(c) ....

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Co-defendant's confession was read before the jury and admitted into evidence with mere admonition to the jury that it was not to be considered as to petitioner.
- (b) Trial judge's failure to sever the cause, to delete or determine if the confession could be deleted.

See petition as Exhibit "A" attached to rear.

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See petition as Exhibit "A" for specifics.
- (b)
- (c)

12. Prior to this petition have you filed with respect to this conviction:

- (a) Any petition in a State Court for relief from this conviction? Yes.
- (b) Any petitions in State or Federal Courts for habeas corpus? Yes.
- (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?.....
- (d) Any other petitions, motions, or applications in this or any other court? Yes.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:

- (a) The specific nature thereof:
- I. Motion for remittitur.
  - II. Habeas corpus.
  - III. ....
  - IV. ....
- (b) The name and location of the court in which each was filed:
- I. District Court of Appeal, Second Appellate District, Division One.
  - II. Supreme Court of the State of California.
  - III. ....
  - IV. ....
- (c) The disposition thereof:
- I. Denied without comments.
  - II. Denied without comments.
  - III. ....
  - IV. ....
- (d) The date of each such disposition:
- I. February 28, 1968.
  - II. March 20, 1968.
  - III. ....
  - IV. ....
- (e) If known, citations of any written opinions or orders entered pursuant to each such disposition:
- I. ....
  - II. ....
  - III. ....
  - IV. ....

14. Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:
- (a) Which grounds have been previously presented?
    - I. See petition attached as Exhibit "A" for specifics.
    - II. \_\_\_\_\_
    - III. \_\_\_\_\_
    - IV. \_\_\_\_\_
  - (b) The proceedings in which each ground was raised?
    - I. Habeas corpus.
    - II. \_\_\_\_\_
    - III. \_\_\_\_\_
    - IV. \_\_\_\_\_
16. If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state concisely the reasons why such ground has not been previously presented:
- (a)
  - (b)
  - (c)
17. Were you represented by an attorney at any time during the course of:
- (a) Your Arraignment and Plea? Yes.
  - (b) Your Trial, if any? Yes.
  - (c) Your sentencing? Yes.
  - (d) Your Appeal, if any, from the judgment of conviction of the imposition of sentence? Yes.
  - (e) Preparation, presentation or consideration of any petitions, motions or applications with

respect to this conviction, which you filed?  
No.

18. If you answered "yes" to one or more of (17), list:

(a) The name and address of each attorney who represented you:

I. ....

II. ....

III. ....

(b) The proceedings at which such attorney represented you:

I. ....

II. ....

III. ....

19. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see, Instructions, page 1, of this form)? Yes.

---

### Verification

State of California

County of Marin—ss.

I, \_\_\_\_\_, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Dated: April 3, 1968.

Respectfully submitted,

By: /s/ Joe B. O'Neil

Signature of Petitioner

United States District Court  
Northern District of California  
Southern Division

*Forma Pauperis Affidavit*

State of California  
County of Marin—ss.

I, Joe J. B. O'Neil, petitioner in the above entitled cause, am an indigent person, and a citizen of the United States, over the age of twenty-one (21) years; that he is unable to prepay the fee of, or to file a petition for a writ of habeas corpus; and papers in support thereof, or to hire counsel to prosecute said writ; that he is without funds, or anything of value with which to pay or secure the cost necessary to prosecute said petition and the proceedings in connection therewith; that affiant believes he has a good and just cause of action, and therefore prays that this Court permit him to proceed in the above-entitled cause without pre-paying the costs required by this Court in such cases, and that security for same be waived by virtue of his indigent circumstances.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Joe B. O'Neil

(Signature of Petitioner, affiant)

Notary Seal

Affixed on Original

*Verification*

State of California  
County of Marin—ss.

Joe J. B. O'Neil, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Joe B. O'Neil  
(Signature of Petitioner, affiant)

Date: April 3, 1968.

Original Filed April 25, 1968,  
Clerk, U. S. District Court,  
San Francisco.

United States District Court  
for the Northern District of California

No. 49136

Joe J. B. O'Neil,	Petitioner,
vs.	
Louis S. Nelson, Warden,	Respondent.

ORDER ALLOWING PETITIONER  
TO FILE IN FORMA PAUPERIS

Upon reading the affidavit of Joe J. B. O'Neil, in forma pauperis, It Is Ordered that said petitioner be and he is hereby allowed to file his Petition for Writ of Habeas Corpus, without prepayment of fees.

Dated, San Francisco, California,  
April 23, 1968.

/s/ Albert C. Wollenberg  
United States District Judge

Filed April 25, 1968,  
James P. Welsh, Clerk.

United States District Court  
for the Northern District of California

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No. 49136

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Joe J. B. O'Neil,	} Petitioner,
vs.	
Louis S. Nelson, Warden,	
	} Respondent(s).

ORDER TO SHOW CAUSE

Based upon the petition filed herein and good cause appearing:

It Is Hereby Ordered that Respondent(s) file a return with this Court on or before the 20th day of May, 1968, to show cause, if any there be, why a writ of habeas corpus should not be issued herein;

It Is Further Hereby Ordered that the Clerk of this Court forthwith serve a copy of this order upon Respondent(s) as well as upon Petitioner and a copy of the petition and of this order upon official counsel for Respondent(s) and that Respondent(s) serve a copy of the return upon Petitioner prior to the filing thereof;

It Is Further Hereby Ordered that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified; and

It Is Further Hereby Ordered that Respondent(s) or counsel for Respondent(s) appear in person before this Court on the 21st day of June, 1968, at 10:00 A.M., to complete compliance with this order to show cause.

Dated: April 23, 1968.

Albert C. Wollenberg  
Judge

Original Filed April 25, 1968,  
Clerk, U. S. District Court,  
San Francisco.

United States District Court  
Northern District of California

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No. 49136

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Joe J. B. O'Neil,

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

RETURN TO ORDER TO SHOW CAUSE AND  
POINTS AND AUTHORITIES IN OPPOSITION  
TO PETITION FOR WRIT OF  
HABEAS CORPUS

Come now respondents, Louis S. Nelson, Warden of the California State Prison at San Quentin, California, and the People of the State of California, and for a return to the order to show cause heretofore issued in the above-entitled matter, and returnable the 20th day of May, 1968, state:

I

Petitioner, Joe J. B. O'Neil, is properly imprisoned in the California State Prison at San Quentin, California, pursuant to a valid judgment and commitment of the Superior Court of the State of California for the County of Los Angeles, dated June 17, 1965, in action No. 301136, and entitled "The People of the

State of California vs. Joe J. B. O'Neil." This judgment reflects that petitioner was convicted by jury of the felonies of kidnaping for purposes of robbery (Cal. Pen. Code § 209), robbery in the first degree (Cal. Pen. Code § 211) and vehicle theft (Cal. Veh. Code § 10851). A copy of this judgment is attached herewith, marked "Exhibit A," and incorporated herein by reference.

## II

Petitioner appealed his convictions to the California Court of Appeal and they were affirmed by Division One of the Second Appellate District of that court in an opinion (certified for non-publication) filed March 30, 1967. *People v. O'Neil and Runnels*, 2/Crim. No. 11303. A copy of this decision is attached herewith, marked "Exhibit B," and incorporated herein by reference. A petition for rehearing was denied on April 26, 1967, and petitioner did not file a petition for hearing with the California Supreme Court. Petitioner's application to recall the remittitur was denied by the California Court of Appeal on February 7, 1968.

## III

Petitioner filed an application for habeas corpus with the California Supreme Court on March 7, 1968, which was denied by that court without opinion on March 20, 1968. *In re O'Neil*, Crim. No. 12020. Copies of petitioner's application and of the order of denial are attached herewith, marked respectively "Exhibit C" and "Exhibit D," and incorporated herein by reference.

IV

Petitioner's application presents no federal question.

Wherefore, it is prayed that the order to show cause issued on April 23, 1968, should be discharged, and the petition for writ of habeas corpus denied.

Dated: May 17, 1968

Thomas C. Lynch  
 Attorney General of California  
 Albert W. Harris, Jr.  
 Assistant Attorney General  
 Derald E. Granberg  
 Deputy Attorney General  
 Attorneys for Respondent

Original Filed May 17, 1968,  
 Clerk, U.S. District Court,  
 San Francisco.

## POINTS AND AUTHORITIES

*Petitioner's Contention*

Petitioner was tried jointly with his codefendant Runnels in May and June of 1965. He moved unsuccessfully in the trial court for a severance. During their joint trial a confession by his codefendant Runnels was admitted in evidence under appropriate limiting instructions.

Subsequent to petitioner's convictions, the California Supreme Court on November 12, 1965, decided *People v. Aranda*, 63 Cal.2d 518 (1965), in which it adopted a rule of evidence precluding the prosecution from introducing into evidence during a joint trial an extrajudicial statement by one defendant unless all parts of the statement implicating any codefendants are effectively deleted. On appeal, petitioner relying upon *Aranda*, argued that the trial court erred in denying his motion to sever his trial from the trial of his codefendant Runnels. The Court of Appeal rejected his contention in reliance on the state's harmless error rule and on the holding that *Aranda* was not applicable to cases tried prior to the date of that decision.

Petitioner now asks this Court to elevate the state evidentiary rule adopted in *Aranda* to a federal constitutional standard and to overturn his conviction on that holding.

*Argument***Petitioner's Application Presents  
No Federal Question.**

As noted above, petitioner was tried jointly with his codefendant Runnels in May and June of 1965 and was convicted of kidnaping for purposes of robbery, robbery in the first degree and vehicle theft. Petitioner moved unsuccessfully to sever his trial from the trial of his codefendant and during their joint trial a statement by his codefendant was admitted into evidence with instructions to the jury that it was not to be considered as against petitioner. Petitioner now argues that he was denied due process by the trial court's ruling denying his motion to sever and by a later ruling permitting the introduction in evidence of the statement by his jointly tried codefendant.

The rule of evidence followed in California at the time of petitioner's convictions in 1965 which permitted the statement by his jointly tried codefendant and admissible only against him to be admitted in evidence under appropriate limiting instructions was and is consistent with due process. *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Opper v. United States*, 348 U.S. 84 (1954); *United States v. Ball*, 163 U.S. 662 (1896); *Bates v. Wilson*, 385 F.2d 771 (9th Cir. 1967); *Amsler v. United States*, 381 F.2d 37, 43-44 (9th Cir. 1967). Any suggestion that *Delli Paoli* has been overruled by implication by the Supreme Court holding in *Jackson v. Denno*, 378 U.S. 368 (1964), is answered by that Court's decision in *Spencer v. Texas*, 385 U.S. 554, 563-65 (1967).

The change in law effected by the California Supreme Court in *Aranda* was not a change effected under constitutional compulsion but rather by way of declaring a rule of practice to implement a state penal statute. *People v. Aranda, supra*, 63 Cal.2d at 529-30. Neither the decision to deny that state rule of evidence retroactive application nor the application of the state's harmless error rule to error occurring under that new rule presents any federal question. *Chapman v. California*, 386 U.S. 18, 21 (1967); *Bates v. Wilson, supra*, 385 F.2d at 774.

**Exhibit A**

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**Superior Court of the State of California  
for the County of Los Angeles**

**JUDGMENT**

**Department No. 116**

**June 17, 1965.**

**Present Hon. Kathleen Parker, Judge**

**The People of the State of California,        vs  
Joe J B O'Neil                                        301136**

**Deputy District Attorney C L Peven and the Defendant with counsel, A Black, present. Motion for a new trial denied. Counts 1, 2 and 4: Probation denied. Sentenced as indicated. Sentence as to Counts 2 and 4 is stayed pending a determination of any appeal and if affirmed Counts 2 and 4 on appeal pending the service of any sentence under Count 1 at the conclusion of Service of sentence on Count 1, the stay on Counts 2 and 4 shall become permanent.**

**Whereas the said defendant having been duly found guilty in this court of the crime of Kidnaping for the Purpose of Robbery (Sec 209 PC) a felony, as charged in Count 1 of the information; Robbery (Sec 211 PC) a felony, as charged in Count 2, which the Jury found to be Robbery of the first degree and Violation of Section 10851, Vehicle Code, a felony, as charged in Count 4; defendant having been found armed with a deadly weapon at the time of the commission of said offenses and not armed at time of arrest.**

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law, on said Counts.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

**Exhibit B**

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In the Court of Appeal of the State of California  
Second Appellate District  
Division One

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Criminal No. 11303

<p>The People,  vs.  Joe J. B. O'Neil and Roosevelt Runnels, Defendants and Appellants.</p>	}	<p>Plaintiff and Respondent,</p>
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Appeals from judgments of the Superior Court of Los Angeles County. Kathleen Parker, Judge. Affirmed.

Dan O'Neill, under appointment by the Court of Appeal, for Defendants and Appellants.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Walter R. Jones, Deputy Attorney General, for Plaintiff and Respondent.

---

Defendants O'Neil and Runnels were accused in count 1 of violating section 209 of the Penal Code (kidnaping to commit robbery), in count 2 of violating section 211 of the Penal Code (armed robbery),

in count 3 of violating section 487, subdivision 3, of the Penal Code (grand theft, automobile), and in count 4 of violating section 10851 of the Vehicle Code (taking automobile without consent of owner). In a jury trial, they were found guilty on counts 1, 2, and 4, and not guilty on count 3. O'Neil states, in his notice of appeal, that he appeals from the judgment and sentence. Runnels states, in his notice of appeal, that he appeals from the judgment and the denial of his motion for a new trial.

Appellant O'Neil contends that the court erred in denying a motion made by defendant O'Neil to sever his trial from the trial of defendant Runnels. Appellant Runnels contends that the court erred in receiving evidence of his confession in that, according to his testimony, it was the product of an illegal arrest. Runnels also contends that the evidence does not support the jury's finding that he was armed "at the time of the offense."

On February 8, 1965, about 10:30 p.m., Vance Collins was sitting in his white two-door 1956 Cadillac automobile, which was parked in the parking lot of a supermarket, at 3993 South Western Avenue in Los Angeles, where his wife was shopping. Defendant O'Neil opened the left front door of the Cadillac, sat in the front seat, pointed a silver-plated gun at Mr. Collins, and said: "There is a fellow on your other side. Would you let him in?" Mr. Collins leaned forward and defendant Runnels entered the Cadillac and sat in the back seat. When O'Neil told Mr. Collins to back out of the parking lot, Mr. Collins, who

"was very much afraid," followed O'Neil's directions. O'Neil then directed him to drive several blocks, and said that if he (Mr. Collins) did not have any money he might get hurt. O'Neil asked for Mr. Collins' wallet, and when it was exhibited, Runnels took it and removed \$8 or \$9 therefrom. O'Neil, who was still pointing the gun at Mr. Collins, told him to stop the car and get out. When Mr. Collins left the car, O'Neil told him to cross the street. Runnels then got into the front seat and drove away.

About two hours later (about 1 a.m. on February 9, 1965) Officers Kirk and Cornett, who were on patrol duty, received a radio call that "there was a suspicious white vehicle with two male Negro occupants circling Taylor's Liquor Store, and the manager was worried." The officers drove to the liquor store and talked with the manager, who said that a white Cadillac had been circling the block where the liquor store was located. One of the officers then saw a white car with two Negro occupants moving slowly in an alley near the store, and the manager said: "That is the vehicle." The officers then followed the white car, which was a 1956 Cadillac. While they were following the Cadillac, the man (later identified as O'Neil) who was sitting on the passenger side threw what appeared to be a shiny revolver from the window of the Cadillac. The officers, after turning on the patrol car's siren and red lights, stopped the Cadillac. They arrested Runnels, who was driving the car, and O'Neil, who was a passenger. Then the officers returned to the place where the shiny object

had been thrown from the car and found a silver-plated .22 caliber revolver which was "loaded."

In the evening of February 9, Mr. Collins went to the police station and identified the defendants, who were in a line-up, as the persons who had robbed him and had taken his Cadillac.

On the day after defendants were arrested, Officer Traphagen had a conversation with defendant Runnels at the police station. The officer advised Runnels that he had a right to an attorney, that he did not have to say anything, and that anything he did say might be used against him in a criminal prosecution. Then Runnels, according to the officer's testimony, made free and voluntary statements which were in substance that he and O'Neil had robbed Mr. Collins and had taken his Cadillac. (Before the statements were received in evidence, the court instructed the jury that the statements were to be received and considered only as to defendant Runnels, and were not to be considered in any manner as against defendant O'Neil.)

O'Neil's mother and sister testified in substance that on February 8, 1965, O'Neil and Runnels had been at the O'Neil home from 9 p.m. to 11 p.m.

Lee Brooks, called as a witness by defendants, testified that on February 8, 1965, about midnight, he saw O'Neil and Runnels sitting in a big white car near the Top Cat Club at 61st Street and Vermont Avenue, and another fellow came out of the club and gave some keys to O'Neil or Runnels, who then drove away in the car.

Defendant Runnels testified in substance that he and O'Neil were at the O'Neil home on February 8, 1965, and left there about 11 p.m.; while they were sitting at a bus stop, a man named Gary, who was driving a 1956 Cadillac, gave them a ride to a night club; Gary went into the club; about 12:20 a.m. Gary returned to the Cadillac, gave the keys to O'Neil, and told O'Neil to bring the car back to the club about 2 a.m.; he (Runnels) drove the car because O'Neil did not have a driver's license; they drove toward Santa Monica; while they were driving, O'Neil found a gun in the glove compartment; they drove into an alley to find a place to throw the gun; O'Neil threw the gun from the window; and the police stopped them and arrested them. Runnels denied that he had made any statements to the officers.

Defendant O'Neil's testimony was similar to Runnels' testimony. He also testified that Gary was James Garrett, whose address was known to him (O'Neil), but that no attempt had been made to subpoena Garrett as a witness.

Mildred Manchester, Runnels' common-law wife, testified that she had a conversation with Officer Traphagen wherein the officer had said that he would see that Runnels would get a life sentence if he did not make a statement, and asked her to see what could be done; later that day she received a telephone call from Runnels and told him what the officer had said, but Runnels told her he was not going to make a statement.

Appellant O'Neil contends that the court erred in denying his motion to sever his trial from the trial of defendant Runnels. He asserts that such severance was required by the decisions in *People v. Aranda*, 63 Cal. 2d 518 [47 Cal. Rptr. 353, 407 P. 2d 265], and *People v. Gilbert*, 63 Cal. 2d 690 [47 Cal. Rptr. 909, 408 P. 2d 365].

In *Aranda*, a confession by defendant Martinez was received in evidence in a joint trial (of Martinez and Aranda), and the jury was instructed to consider the confession as evidence against Martinez only. Before Martinez had confessed, he had not been advised of his right to an attorney or of his right to remain silent, and the Supreme Court held (p. 523) that the confession was inadmissible under the *Escobedo* decision. With reference to the effect of the confession on Aranda, the court said (p. 524): "This court has consistently held that a joint trial is permissible under Penal Code section 1098 even though the prosecution has obtained a confession from one defendant inculcating both defendants and intends to introduce that confession into evidence." It was noted (p. 525) that the Supreme Court of the United States had approved such rule in joint trials in the federal courts, but that other courts had criticized the rule (pp. 525-526). It was then said (p. 526): "At best, the rule permitting joint trials in such case is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer

room for compromise. . . . Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. [Citations.] The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him [citation] preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant." It was then said (p. 527) that "it is reasonably probable that a result more favorable to Aranda would have been reached had Martinez's confession been excluded." The judgments (against Martinez and Aranda) were reversed.

In *Gilbert* (*supra*, 63 Cal. 2d 690), also relied upon by appellant, it was held (p. 702) that the admission in evidence, in a joint trial, of incriminatory statement made by King was not prejudicial to Gilbert "in face of the overwhelming evidence of Gilbert's guilt."

In the present case, the confession made by Runnels implicated O'Neil. Before Runnels made those statements, however, he had been advised that he had a right to an attorney, a right to remain silent, and that the statements might be used in a criminal prosecution. The trial was in May and June 1965, after the *Escobedo* decision and prior to the *Miranda* decision. Thus, the confession was admissible against O'Neil (see *People v. Rollins*,<sup>a</sup> 65 Cal. 2d ..... [..... Cal. Rptr. ...., ..... P. 2d .....]; *People v. Thomas*,<sup>b</sup> 65 Cal. 2d

<sup>a</sup>Advance Report Citation: 65 A. C. 731.

<sup>b</sup>Advance Report Citation: 65 A. C. 749.

..... [..... Cal. Rptr. ...., ..... P. 2d .....]), whereas the confession in *Aranda* was "not admissible at all" (i.e., was not admissible against the declarant, Martinez, or against the nondeclarant, Aranda). In view of the overwhelming evidence of O'Neil's guilt, it is not reasonably probable that a result more favorable to O'Neil would have been reached had Runnels' confession been excluded.

Furthermore, it has been held that the rules set forth in *Aranda* with reference to the severance of trials where a confession of one defendant implicates another defendant do not apply to trials which occurred prior to the date (November 12, 1965) when the *Aranda* decision was filed. (*People v. Williams*, 239 Cal. App. 2d 42, 46 [48 Cal. Rptr. 421]; see *People v. Culp*, 241 Cal. App. 2d 352, 357-358 [50 Cal. Rptr. 471].) As previously stated, the trial in the present case was in May and June 1965. The court did not err in denying O'Neil's motion to sever his trial from the trial of Runnels.

Appellant Runnels contends that the court erred in receiving evidence of his confession in that, according to his testimony, it was the product of an illegal arrest. He asserts that although the officer "was entitled to arrest O'Neil," the arrest of Runnels "was without probable cause." The officer, who was on patrol duty about 1 a.m., received a radio call that "a suspicious white vehicle" was circling a liquor store and that the manager of the store was worried. When the officer arrived at the store, the manager pointed to a white cadillac which was moving slowly in an alley near the store. The officer followed the Cadillac, and one of the

occupants threw a shiny object from the window. A silver-plated revolver was found where the object had been thrown. There was probable cause for the arrest of Runnels, who was driving the Cadillac. Runnels' contention is without merit.

Runnels further contends that the evidence does not support the jury's finding that he was armed "at the time of the offense" (robbery). There was evidence that when O'Neil and Runnels entered Mr. Collins' Cadillac, O'Neil pointed a revolver at Mr. Collins, and Runnels took money from Mr. Collins' wallet. There was also evidence that after O'Neil forced Mr. Collins to leave the Cadillac, Runnels drove it away. Under such circumstances, the fact that Runnels was not armed would not preclude the jury from finding him guilty of first degree robbery. (See *People v. Perkins*, 37 Cal. 2d 62, 64 [230 P. 2d 353]; *People v. Tempelis*, 230 Cal. App. 2d 596, 598 [41 Cal. Rptr. 253].)

The appeal from the order denying Runnels' motion for a new trial is dismissed. Affirmance of the O'Neil judgment is an affirmance of the O'Neil sentence.

The judgments are affirmed.

Wood, P. J.

We concur:

Fourt, J.

Lillie, J.

Certified for non-publication in Official Reports under Rule 976.

Wood, P. J.

Fourt, J.

Lillie, J.

**Exhibit C****In the Supreme Court of the  
State of California****Crim. 12,020**

<b>Joe J. B. O'Neil</b>	<b>Petitioner</b>
<b>vs.</b>	
<b>Louis S. Nelson, Warden</b>	<b>Respondent</b>

**PETITION FOR WRIT OF HABEAS CORPUS**  
**Instructions—Read Carefully**

Set forth in concise form the answers to each applicable question. If you do not know the answer to any question, you should so state. If necessary, you may finish the answer to a particular question on an additional blank page, but make it clear to which question any such continued answer refers.

You should exercise care to assure that all answers are true and correct. Since the petition contains a verification, the making of a statement which you know is false may result in a conviction for perjury.

When the petition is filed with the Superior Court or judge thereof, only the original must be filed unless additional copies are required by local court rules.

When the petition is filed with the District Court of Appeal or justice thereof, an original and three copies must be filed.

When the petition is filed with the Supreme Court or justice thereof, an original and ten copies must be filed.

In addition, the law requires the service of a copy of the petition on the district attorney, city attorney or city prosecutor in certain cases (Pen. Code § 1475, Gov. Code § 72193).

Petitioner should attach all relevant records or documents supporting his claims.

1. Joe J. B. O'Neil (name of person in custody) in whose behalf the writ is applied for is confined or restrained of his liberty at P.O. Box A—90909, Tamal, California (place of detention) by Louis S. Nelson, Warden (name of person or persons having custody—if names not known describe such person or persons).
2. Name and location of court under whose process person is confined: Superior Court of Los Angeles County.
3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: Criminal Case.

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Approved by the Judicial Council of California for use under Rules 56.5 and 201 (f) of the California Rules of Court [as adopted effective Jan. 1, 1966].

4. The date of judgment, order or decree for confinement and its terms: May 19, 1965, Robbery 211, Kidnapping for the purpose of robbery 209, Vehicle Code, Section 10851; Sentence to life.
5. What plea was entered in the above proceeding? (E.g., guilty, not guilty, not guilty by reason of insanity, nolo contendere, etc.) Not Guilty.
6. Check whether trial or hearing was by
  - (a) ☒ A jury
  - (b) ☐ A judge without a jury
7. Was an appeal taken? Yes
8. If you answered "yes" to (7), list
  - (a) The name of each court to which an appeal was taken:
    - i District Court of Appeal, Second Appellate District, Division One.
    - ii.....
    - iii.....
  - (b) The result in each such court:
    - i Superior Court's conviction was affirmed.
    - ii.....
    - iii.....
  - (c) The date of each such result and, if known, citations of any written opinions or orders entered: March 30, 1967.
    - i Ruled People v. Aranda, 63 Cal. 2d 518 (47 Cal. Rptr. 353, 407 P. 2d 265), Non-retroactive to Petitioner.
    - ii.....
    - iii.....

9. If the answer to (7) was "no" state the reasons for not so appealing:
10. State concisely the grounds on which you based your allegation that the imprisonment or detention is illegal:
  - (a) Trial judge's failure to sever the cause, to delete or determine if it could be deleted. See Petition as Exhibit "A" attached to rear.
  - (b) .....
  - (c) .....
11. State concisely and in the same order the facts which support each of the grounds set in (10):
  - (a) See Petition as Exhibit "A" attached to rear.
  - (b) .....
  - (c) .....
12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? Yes.
13. If you answered "yes" to (12), list with respect to each petition, motion or application:
  - (a) The specific nature thereof:
    - i Motion for remittitur Crim. No. 11303.
    - ii.....
    - iii.....
    - iv.....

(b) The name and location of the court in which each was filed :

i District Court of Appeal, Second Appellate District Division One.

ii.....

iii.....

iv.....

(c) The disposition thereof :

i Denied without comment

ii.....

iii.....

iv.....

(d) The date of each such disposition :

i February 28, 1968

ii.....

iii.....

iv.....

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition :

i No Comment

ii.....

iii.....

iv.....

14. Has any ground set forth in (10) been presented to this or any other court, state or federal, in any petition, motion or application? Yes.

15. If you answered "yes" to (14) identify:

(a) Which grounds have been previously presented:

i Denial of severance of trial

ii.....

iii.....

(b) The proceedings in which each ground was raised:

i On Appeal

ii Motion for Remittitur

iii.....

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) .....

(b) .....

(c) .....

17. In the proceeding resulting in the confinement complained of, was there representation by an attorney at any time during the course of:

(a) The proceedings prior to trial? Yes

(b) The trial or hearing? Yes

(c) The sentencing or commitment? Yes

(d) An appeal? Yes

(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? No.

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:

(a) .....

(b) .....

(c) .....

19. Is the person in custody presently represented by an attorney in any matter relating to this confinement?..... If so, state the attorney's name and address: .....

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

The trial Court procedure composes a Constitutional violation

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on February 28, 1968 at P.O. Box A 90909, Tamal, California.

I declare under penalty of perjury that the foregoing is true and correct.

Joe J. B. O'Neil  
(Signature)

Filed March 7, 1968,  
William I. Sullivan, Clerk.

In the Supreme Court of the State of California

Case No. 11303

Joe J. B. O'Neil,

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

*To: The Honorable Chief, and Associate Justices of  
the above entitled Court.*

Comes Joe J. B. O'Neil, Petitioner, in the above entitled caption with his claim of a constitutional violation.

That he, the said Petitioner, is unlawfully imprisoned, detained, confined and restrained of his liberty by the Warden, Louis S. Nelson, at San Quentin Prison in Marin County, State of California, by virtue of presently complained illegal judgment; and that the illegality thereof consist in this, to wit:

*Jurisdiction*

Jurisdiction to hear and determine this cause is now invoked under the authority of Art. 6, Section 10, of the California Constitution, and Section 1473 of the California Penal Code.

*Statement of the Case*

Your Petitioner is presently incarcerated pursuant to a judgment of conviction rendered by the Superior Court of the State of California, in and for Los Angeles County, on May 19, 1965, of the crimes of robbery, Penal Code, Section 211; kidnapping for the purpose of robbery, Penal Code, Section 209; and violation of Section 10851, Vehicle Code, (C.T. 1-4). Upon imposition of the terms prescribed by law, life, Petitioner was received by the California Correctional Authorities where he is presently confined.

*Statement of Facts*

At approximately 1:00 a.m., February 9, 1965, Petitioner and co-defendant Runnels were arrested by officer John O. Kirk, of the Culver City Police Department after being removed from a white 1956 Cadillac, which proved to belong to the victim, Mr. Vance Collins. The day following their arrest, co-defendant Runnels made a complete confession to the crimes to officer Traphagen, naming Petitioner as the instigator and claiming that he had suggested that the two of them "make a couple of hits" and that it was Petitioner who actually carried out the robbery and kidnapping. He further confessed that when cruising around in the Cadillac, they were waiting for a favorable moment to perpetrate a robbery in a liquor store when arrested. R.T. 103-104-105.

Vance Collins, the victim of the alleged crimes, testified that on February 8, 1965, at approximately 10:30 p.m. he was sitting in his 1956 Cadillac on the

parking lot of a market at 3993 South Western Avenue, Los Angeles (R.T. 10-11), when he was kidnapped by two men; directed to drive a few blocks, robbed of \$8.00 and then put out of the automobile. R.T. 21.

The following day the victim was called to the police station and identified Petitioner as one of the men involved in the crimes. R.T. 26-27. However, the victim testified as to the prevailing conditions during the alleged crimes. Upon entering the car, Petitioner immediately directed him to keep his eyes straight ahead, and that upon this directive, he kept his eyes straight ahead throughout the time he was driving, until he was ordered out of the car. R.T. 29-30-34-39-40. He got only one look at Petitioner as he entered the car. R.T. 38.

He further testified that during the incident there was "not too much light, but you could see very good." R.T. 32. His description of Petitioner was a vital flaw. Initially, he noted that he "may have" described the suspect identified as Petitioner as approximately five feet tall (R.T. 43-177), light complectioned, and wearing a hat. R.T. 46. On the contrary, Petitioner testified that he was around five feet ten to five feet eleven inches tall. R.T. 202. Secondly, the victim testified in regards to description that at the lineup Petitioner may have been wearing a blue jacket and brown trousers, "... I'm not sure, to my knowledge." R.T. 44-45. In relation to the lineup itself, the victim testified that he was not sure how many men were in the lineup. That he believed three of the men were Negroes, but

was not sure (R.T. 45) and could not say where Petitioner was standing. R.T. 47.

On the day preceding the trial, defense counsel made motions as follows: "Mr. Black: Thank you, your Honor, I have a motion for severance of cause, your Honor, and this is—I desire that defendant O'Neil's case be separated from the co-defendant's case. This is based upon evidence which was learned by me yesterday, and I feel, your Honor, that if it is true that certain statements were made by the co-defendant, or should the same come into evidence—allegedly made by the co-defendant—it would prejudice defendant O'Neil, and so far as his defense and due process of law, your Honor, I believe that the statements will deny him a fair trial, and with that I submit it, your Honor."

Again, immediately before Runnels' confession was presented through the police officers' testimony, defense counsel motioned as follows: "Mr. Black: I also desire your Honor to strike the part of the conversation as it relates to the defendant O'Neil, in that defendant O'Neil was not there at the time to either affirm or deny the statements which allegedly were made at this time." "The Court: Your first motion to strike is denied; I will, however, instruct the jury that this conversation will be received only as against defendant Runnels." "Mr. Black: The second motion is in regard to defendant O'Neil. My second motion is that this conversation be stricken as to defendant O'Neil." "The Court: Your motion to strike *any part* of the conversation is denied as far as being received

in evidence. The jury will be instructed that it will be received only as against Mr. Runnels." R.T. 3-4-5 and R.T. 94-95.

The evidence of co-defendant Runnels' confession was received through the testimony of officer Traphagen with the court's admonition to the jury that it was not to be considered as against Petitioner. R.T. 102.

### *Arguments*

(I) Denial of the motion for severance of the cases deprived Petitioner of his requisite procedural rights to due process.

(II) In view of the equivocal identification, Petitioner's alibi defense could have proved effective had the statement been properly deleted.

For the defense, Lee Brooks testified that on February 8, around midnight, he observed Petitioner near 61st Street and Vermont Avenue, sitting in a big white car. (R.T. 145-152). A man unknown to him went to the car and handed some keys to Petitioner or Runnels, and then Runnels drove the car away. (R.T. 146-150-151). Loydean Mayfield, testified that on the night of February 8, Petitioner arrived at her home about 9:00 p.m., (R.T. 163) and did not leave until a little after 11:00 p.m. Mrs. Otha O'Neil, Petitioner's Mother, whose testimony is set forth on pages 174 through 183 R.T., corroborated this testimony. And Petitioner himself testified in a similar vein. R.T. 220.

### *Allegations*

The improper denial of the motion for severance of the trial, and the trial court's refusal to delete from the statement that conversation which related to Petitioner, are the contentions which Petitioner asserts denials under the 5th, 6th and 14th Amendments of the Federal Constitution, and Article 1, Sec. 13 of the California Constitution.

### *Points and Authorities*

The authority necessitating judicial review is clearly expressed by Section 1473 of the Penal Code: "Every person unlawfully imprisoned, or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

The judicial rule denouncing the use of a defendant's confession against a non-confessing codefendant has been a long established practice in criminal cases. Thus, special emphasis must be placed on presentation of Runnels' confession. "Moreover, as we stated in *People v. Parham* (1963) 69 Cal. 2d 378, 385 (33 Cal. Rptr. 497, 384 P. 2d 100), a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction."

It is not difficult to determine what effects Runnels' confession had on the jury. Without its use the evidence was insufficient as a matter of law to convict Petitioner. The victim's equivocal identification of Petitioner amply supports this fact. Because of the use

of Runnels' confession at the trial, two factors worked against Petitioner. His alibi defense was nullified and the combined trials with the judge's failure to delete the confession, prejudiced him to such an extent as to deny him due process and equal protection of the law. See *People Dorado* (1965) Ante, pp. .... (42 Cal. Rptr. 169, 398 P. 2d 361); *People v. Stewart* (1965) Ante, pp. .... (43 Cal. Rptr. 201, 400 P. 2d 97): "And we have held that the erroneous admission of a confession is prejudicial per se and therefore compels reversal. See also *Witkins, Cal. Evidence* (1959) 275. Failure of the trial judge to sever the cause or to delete that conversation of Runnels' confession which related to Petitioner constituted erroneous admission of the confession.

In decisions consistent with the facts of this case, the Supreme Court observed (*People v. Aranda*, 63 Cal. 2d 518, 530-531) . . . The rules are, a separate trial for a non-confessing co-defendant unless (1) incriminating portions of the confession can be effectively deleted without prejudice to the confessing individual or (2) prosecutor's assurance the confessions will not be used." *People v. Massie and Vetter*, State Supreme Court. Crim. 9506 (June 21, 1967); "In the confession the murderer referred to himself and the codefendant either as "me and John" or "we" being the ones committing the crimes.

Absent federal constitutional compulsion, the test for "the prejudicial effect of an erroneous denial of a separate trial under the harmless error rules" would be consideration of (A) particular errors identified,

(b) significant differences occurring if a separate trial were granted and (c) the amount of guilt evidence, presented at the joint trial, the Supreme Court announced." So, here the alleged accomplice was prejudiced by being denied a separate trial for it was reasonably probable he would have obtained a more favorable verdict if the trial judge did not have to exclude from his consciousness the inadmissible confession evidence of the accomplice being named driver of the getaway car" . . .

The trial judge's failure to sever the trials or to delete or determine if the conversation relating to Petitioner could be deleted, constituted error under *People v. Massie and Vetter, Supra*, Quoting: "Vetter contended that the court erred in denying his motion for separate trial. We explain that the judge committed error (1) in failing to exercise his discretion to consider relevant and long-established reasons for granting a severance, and (2) in failing to order a separate trial under the rules announced in *People v. Aranda*, (1965) 63 Cal. 2d 518, 530, 531." Without determining if the confession could be properly deleted, the trial court erred by denying the motion for separate trial, where the motion was made one full day prior to the actual trial, where evidence of Petitioner's guilt had not been presented, yet where the confession loomed high as reason for granting the motion. See *Schaffer v. United States*, (1960) 362 U.S. 311, 321; *Cross v. United States*, 331 F. 2d 85; *United States v. Thompson* (4th Cir. 1940) 113 F. 2d 643, 646: "Other courts have applied harmless error rules, but have

held that improper denial of a separate trial is itself a miscarriage of justice, because (A) the result under the proper mode of trial cannot be guessed; (B) The record cannot be expected to reveal such hidden prejudicial effects of a joint trial as consideration against the defendant of evidence admitted only as against co-defendants, inhibition of the presentation of defense evidence, and guilt by association; and (C) the prejudicial impact of these effects cannot be measured, and may be assumed to be substantial." *People v. Massi and Vetter, Supra.*

The federal courts have considered the denial of separate trials under similar situations as conjunctive to a constitutional violation and without regards for any particular prejudice resulting from the use of the confession, have reversed the conviction. *State v. Rosen* (1949) 151 Ohio St. 339. "The failure of a trial court to grant a separate trial in a case tried before *Rosen* was held to be an abuse of discretion. In that case an incriminating extrajudicial confession was later admitted with appropriate limiting instructions; the conviction was reversed without further consideration of the particular prejudicial effect of the confession." See also *State v. Abbott* (1949) 131 Ohio St. 228, 239.

In *Grum v. United States* (4th Cir. 1959) 272 F. 2d 567, 70-571, "Just as rule 14 does not permit the government to circumvent the prohibition of rule 8 (A), neither does the harmless error rule, rule 52 (A), have this effect. The error here was no mere technicality . . . It is not "harmless error" to violate

a fundamental procedural rule designed to prevent mass trials”.

In *Cupo v. United States* (D.C. Cir. 1966) 359 F. 2d 990, 993 that court reversed a conviction after the trial court improperly denied defendant's motion for a separate trial.

Therefore, the impossibility of the jury to exclude Runnels' incriminating statement from their consideration as to Petitioner's involvement in the alleged crime, must take the precedence and should be given maximum consideration in accordance with relevant criteria. In *Delli Paoli v. United States* (1957) 352 U.S. 232, 247. In *McElroy v. United States* (1896) 164 U.S. 76, 78-81, the United States Supreme Court reversed the convictions of all the defendants because of the improper consolidation of trials, stating it cannot be said in such a case that all defendants may not have been embarrassed and prejudiced in their defense. . . . Such consideration cannot help but be prejudicial.” *Day v. State* (1950) 196 Md. 384, 395; *Stallard v. State* (1948) 187 Tenn. 418, 430; *State v. Desroche* (1895) 222 N.C. (344); *Flamme v. State* (1920) 171 Wis. 501, 507: “Although many courts assume or infer prejudice from improper consolidation of trials, they nevertheless, in reaching the question of whether denials of severance was error, make a threshold examination of possible sources of actual prejudice. See for example, *United States v. Bozza* (2d. Cir. 1966) 365 F. 2d 206; *Culjac v. United States* (9th Cir. 1931) 53 F. 2d 554. The dichotomy between the second and third approaches stated in the text is therefore not as great as might appear.

### *Conclusion*

The trial court therefore violated Petitioner's substantial right to protection against his co-defendant's incriminating confession.

Such violation can't help but offend his constitutional right to due process and equal protection of the law. The trial judge made no effort to determine if co-defendant Runnels' confession could be deleted; it conducted no inquiry to determine the possible prejudice resulting from its presentment, but tended to neglect its obligation to Petitioner and constitutional provisions.

In relation to the facts and authorities herein contained, the conviction should be reversed and Petitioner granted a new trial.

Accordingly, it is for these reasons respectfully submitted by your Petitioner.

### *Prayer*

Wherefore, Petitioner prays that an order issue out of this court, directed to the respondent, commanding him to release said Petitioner from any further restraint in connection with said conviction, or in an alternative order a plenary hearing of the cause; in that a just finding will determine any further action concerning your Petitioner.

Subscribed and sworn to before me this 28 day of February, 1968.

/s/ Joe J. B. O'Neil,  
P. O. Box A - 90909,  
Tamal, California 94964.

**Exhibit D**

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**In the Supreme Court of the State of California  
In Bank**

**Criminal No. 12,020**

**In re O'Neil,  
on Habeas Corpus.**

**ORDER DENYING WRIT OF  
HABEAS CORPUS**

**Petition for writ of habeas corpus Denied  
Mosk, Acting Chief Justice.**

**Filed, March 20, 1968,  
William I. Sullivan, Clerk,  
A. F. Deputy.**

United States District Court  
Northern District of California

No. 49,136

Joe J. B. O'Neil,

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

SUPPLEMENTAL RETURN TO ORDER TO  
SHOW CAUSE AND ADDITIONAL POINTS  
AND AUTHORITIES IN OPPOSITION TO  
PETITION FOR WRIT OF HABEAS CORPUS

On May 17, 1968, we filed our return to the order to show cause issued by this Court in this matter. In taking the position that the petition presented no federal question, we placed considerable reliance on *Delli Paoli v. United States*, 352 U.S. 232 (1957). In essence, we argued that since the United States Supreme Court in its supervisory role over the federal courts had consistently sanctioned an evidentiary rule which permitted a statement by one of two jointly tried defendants admissible only against him to be used with appropriate limiting instructions, the use of a similar evidentiary rule in a state criminal trial presented no federal question.

On May 20, 1968, the United States Supreme Court decided *Bruton v. United States*, 36 U.S.L. Week 4447, in which it overruled *Delli Paoli*. Since the Court's

holding in *Bruton* is predicated on a right of cross-examination secured by the confrontation clause of the Sixth Amendment, that decision establishes not only a new federal evidentiary rule, it establishes a new federal constitutional standard. Without conceding the question, we shall assume for purposes of argument that this new standard is applicable to state criminal prosecutions.

Although the decision in *Bruton* when so viewed undermines the position we took in our return to the order to show cause, sound reasons remain why the order to show cause issued by this Court on April 23, 1968, should be discharged and the petition for writ of habeas corpus denied. In the points and authorities which follow, we shall discuss some of those reasons. In the event that the question of prejudice becomes material to the disposition of this matter, we also include a statement of facts and will lodge with the Court a copy of the reporter's transcript of petitioner's trial in the state court.

#### *Statement of Facts*

On February 8, 1965, at approximately 10:30 p.m., Mr. Vance Collins was seated in his 1956 two-door white Cadillac which was parked in the lot of a supermarket located at 3993 South Western Avenue in the City of Los Angeles. He was awaiting his wife's return from grocery shopping (RT 10-12).

Petitioner O'Neil approached the passenger door of the Collins' automobile, opened it, and got in (RT 12, 13). Petitioner had a silver-plated gun and was pointing it at Mr. Collins. Petitioner told him, "There

is a fellow on your other side. Would you let him in?" (RT 13-14). The driver's side door was opened, and Mr. Collins leaned forward to let the second man in. The second man, petitioner's codefendant Runnels, sat down in the rear seat (RT 14-15).

Petitioner told Mr. Collins to back the car out of the lot. Mr. Collins, in fear, did as he was told. Petitioner continued to give him directions (RT 16). As the victim drove, petitioner told him that he "might get hurt real bad" if he didn't have money (RT 18). Petitioner ordered Mr. Collins to hand over his wallet. Eight dollars was taken, and Runnels returned the wallet to him (RT 19-20).

Approximately three and one-half blocks from the market, petitioner ordered the victim to stop and exit from the car (RT 17, 21, 24). Petitioner still had the gun pointed at him (RT 21). Petitioner ordered Mr. Collins to walk to the rear of the car and then to cross the street. Runnels got out of the back seat and stood beside the vehicle for some time (RT 60). Runnels then got into the driver's seat and drove away with petitioner (RT 21-22, 42). Mr. Collins returned to the market and notified the police (RT 23, 43).

Approximately 1:00 a.m., February 9, 1965, a police patrol unit received a radio message that a suspicious white automobile with two male Negro occupants was circling a liquor store (RT 63, 67-68, 72). The officers drove to the liquor store and talked to the manager. The manager told officers that the white vehicle was first pointed out to him by a customer. The manager then observed the vehicle circle the block two or

three times. These circumstances caused the manager to become apprehensive and telephone police (RT 68, 89). |

At this point, one of the officers saw a white car with two male Negroes approaching in an alley near the liquor store. The vehicle was going slowly, and the manager said, "That is the vehicle" (RT 69, 75). The automobile was a 1956 white Cadillac (RT 70).

Officers began following the Cadillac (RT 63, 71, 75). Petitioner was the passenger and Runnels was the driver (RT 65). During the pursuit, petitioner was observed to throw what appeared to be a shiny revolver from the car (RT 64, 75). Officers, with red light and siren, stopped the suspects (RT 65). On the basis of the radio call and the weapon, both occupants were taken into custody on suspicion of armed robbery when they alighted from the vehicle (RT 66, 80). Officers returned to the location where the object landed and retrieved a silverplated .22 caliber revolver which was loaded with four bullets (RT 66, 78-79).

Petitioner and Runnels were taken to the Culver City police station and the Cadillac was impounded (RT 80). Approximately 4:00 p.m., February 9, 1965, they were formally arrested by Los Angeles police officers and were taken to the University police station (RT 96). On the evening of February 9, 1965, Mr. Collins went to the University police station (RT 26). He was told that the thieves may have been apprehended (RT 34). Mr. Collins was asked to view a police lineup and he positively identified petitioner and Runnels from the lineup (RT 27, 35, 48).

The next day, February 10, 1965, at approximately 10:20 a.m., Officer Traphagen had a conversation with Runnels (RT 92). Runnels was advised that he did not have to say anything; that anything he said might be used in a later criminal prosecution; and that he had a right to an attorney (RT 93). There was no coercion nor were there any promises of immunity (RT 93). Runnels proceeded to make a complete confession implicating petitioner (RT 102-105). The court admitted the confession with an admonition to the jury that it was not to be considered against petitioner (RT 102).

#### *Defense.*

The mother and sister of petitioner both testified that petitioner and Runnels came to the O'Neil home approximately 9:00 p.m. on February 8, 1965 (RT 162-63). They departed shortly after 11:00 of that same evening (RT 163, 167, 175-76). The mother also testified that after her son's arrest, she was told by Mr. Collins that he was unsure of the identification (RT 177).

Mr. Lee Brooks testified that on February 8, 1965, at approximately midnight, he observed petitioner and Runnels sitting in a big white car near 61st Street and Vermont Avenue in the City of Los Angeles (RT 145, 152). An unknown man approached the car and began conversing with them. The man handed what appeared to be keys to one of them (RT 146-47, 149, 157). Runnels got into the driver's seat and drove off with petitioner (RT 146, 147, 150, 151).

Runnels testified that he was with petitioner on the afternoon and evening of February 8, 1965 (RT 185-86). Runnels stated that he and petitioner left the O'Neil household approximately 11:00 p.m. (RT 181). While sitting at a bus stop around midnight, they obtained a ride from a person known as "Gary" (RT 187, 188, 200). Gary was driving a white 1956 Cadillac. He drove them to a night club and went inside. They remained seated in Gary's automobile (RT 188). Shortly thereafter, Gary returned to the car and began conversing with petitioner (RT 188-89). Approximately 12:20 a.m., February 9, 1965, Gary gave the keys to petitioner (RT 189). Petitioner was directed to bring the car back to the night club around 2:00 a.m. (RT 191-92, 207).

Since petitioner did not have a driver's license, Runnels drove (RT 189). They headed for Santa Monica, but on the way petitioner discovered a gun in the glove compartment (RT 189-90). They drove around the block and into an alley to find a place to throw the gun (RT 190, 191). Petitioner threw the gun out of the window (RT 191). At this point, they were stopped and arrested by police (RT 191). Runnels denied making any statement to police officers (RT 192, 211, 213).

Miss Mildred Manchester, the common law wife of Runnels, testified that she talked with Officer Traphagan on the morning of February 11, 1965. She was informed that the officer would see that Runnels got a life sentence if no statement was made as opposed to a lesser sentence if a statement was forthcoming. She

was asked to see what could be done (RT 137-38, 140). Later that day, Miss Manchester received a telephone call from Runnels, and she relayed the officer's message (RT 138). Runnels informed her that he was not going to make a statement (RT 143).

Petitioner testified that he had spent the evening of February 8, 1965, in the company of Runnels (RT 217). His version of the facts paralleled the story told by Runnels. In addition, petitioner was able to identify "Gary" as James Garret (RT 220). Petitioner admitted knowing the residence of Garret, but on cross-examination indicated that no attempt was made to subpoena him (RT 238).

### *Argument*

#### *I*

#### *Petitioner has failed to Exhaust his Available State Remedies.*

Although petitioner has presented an application for habeas relief to the State Supreme Court in which he raises the issues which he presents in his application to this Court, that application was presented and denied prior to the change in law effected by the United States Supreme Court by its decision in *Bruton*. In light of the change in law effected by *Bruton*, petitioner may now have a remedy in the state courts. In any event, the state courts should be permitted to pass preliminarily on that question and we, therefore, for this reason urge this Court to discharge the order to show cause and to deny petitioner's application for federal habeas relief.

## II

*The Change in Law Effected by the United States Supreme Court in Bruton v. United States Should Not be Applied to Cases which Became Final Prior To the Date of That Decision*

Assuming, *arguendo*, that this Court is of the persuasion that petitioner should not be remanded to pursue his new constitutional claim through the state courts, we next urge that the new constitutional standard articulated in *Bruton* should be denied retroactive application. United States Supreme Court has in several recent cases denied retroactive application to constitutional rules of criminal procedure established by innovative decisions which overrule cases sanctioning former practice. *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). With respect to the relevant considerations in determining whether a newly articulated constitutional rule of criminal procedure should be applied retroactively, the Court stated in *Stovall v. Denno*, *supra*, at 296-97:

“Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. *Linkletter v. Walker*, *supra*; *Tehan v. Shott* *supra*; *Johnson v. New Jersey*, *supra*, “These cases establish the principal that in criminal litigation concerning constitutional claims, “the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation requires such an application”

... ' *Johnson, supra*, 384 U.S., at 726-727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.' *Johnson, supra*, at 728."

We are persuaded that a weighing and a balancing of these three relevant considerations leads to the conclusion that *Bruton* should be denied retroactive application. While this newly articulated constitutional rule of criminal procedure is no doubt one which enhances the reliability of the fact-finding process we, along with the California Supreme Court, do not harbor "a belief that the former procedure created a great risk of convicting innocent defendants." *People v. Charles*, 66 Cal.2d 330, 333 (1967). When the minimal impact which this now condemned practice has on the integrity on the truth-determining process at trial is weighed against the prior justified reliance upon the long-standing practice sanctioned by the United States Supreme Court as recently as *Delli Paoli* and the tremendous impact which a decision imposing retroac-

tivity would have upon the administration of justice in not only state but federal courts, a decision denying it retroactivity must follow.

That the purpose of the rule adopted by the United States Supreme Court in *Bruton* is to enhance the reliability of the fact-finding process at trial seems clear beyond question. Indeed, the Court found a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements [of the codefendant] in determining petitioner's guilt." But this conclusion in itself does not compel a retroactive application of the new doctrine. As the Court stated in *Johnson v. New Jersey, supra*, 384 U.S. at 728-29:

"Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson v. Denno, supra*, because confessions are likely to be highly persuasive with a jury, and if coerced, they may well be untrustworthy by their very nature. [Footnote omitted]. On the other hand, we denied retroactive application to *Griffin v. California, supra*, despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probability and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

The Court in *Johnson* then went on to hold that the exclusionary rules articulated in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and in *Miranda v. Arizona*, 384 U.S. 436 (1966), applied only to cases coming to trial after the dates of those decisions. In so doing, the Court noted that "the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." *Johnson v. New Jersey*, *supra*, at 729.

Similarly, in *Stovall v. Denno*, *supra*, the Court limited the applicability of the new exclusionary rule articulated in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), to lineups which were conducted prior to the date of those decisions. And it did so notwithstanding the fact that the new rule it adopted was one intended to enhance the reliability of the fact-finding process at trial. In this regard, the Court said:

"*Wade* and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the presence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so."

*Stovall v. Denno*, *supra*, 388 U.S. at 297.

In this respect, the Court also said:

"Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson v. New Jersey, supra*, at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno, supra*, 388 U.S. at 298.

Thus, in determining whether the rule pronounced in *Bruton* should be applied retroactively, this Court must first weigh the probabilities and arrive at a determination as to the extent to which the practice sanctioned as recently as *Delli Paoli* infected "the integrity of the truth-determining process at trial." And in making that determination, this Court should "take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." *Johnson v. New Jersey, supra*, at 729.

In 1965, the California Supreme Court in *People v. Aranda*, 63 Cal.2d 518 (1965), established a state rule of practice which is essentially identical to the constitutional standard established by the United States Supreme Court in *Bruton*. It did so because it entertained grave constitutional doubt of the validity

of the former practice of permitting joint trials when the confession of one defendant implicated codefendants and because it considered the former practice as prejudicial and unfair to the non-declarant defendants. *People v. Aranda*, *supra*, at 529.

However, when that same court subsequently had occasion to determine whether the rule it established in *Aranda* should be given retroactive application, it concluded that the purposes of the new rule did not require its application to convictions which had become final. *People v. Charles*, 66 Cal.2d 330 (1967). In so doing, it noted that its ruling in *Aranda* "did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants." *People v. Charles*, *supra*, at 333. The conclusion of the California Supreme Court that the former practice did not create a grave risk of convicting innocent defendants is eminently reasonable.

Under the former California practice appropriate limiting instructions had to be given whenever an extrajudicial statement admissible only the declarant was used in a joint trial. Indeed, as a matter of practice, such instructions would be given to the jury not only when they were formally instructed prior to their deliberation but also at the time during trial when the statement was introduced. For example, before the statement by petitioner's codefendant Runnels was admitted into evidence, the court informed the jury as follows:

"The Court: Before you relate the conversation, I will instruct the jury that this statement is to be received and considered by the jury only

as to the defendant Runnels, the one who was making the statement, and is not to be considered by the jury in any manner as against his co-defendant, defendant O'Neil." (RT 102).

With respect to the ability of the jury to follow such limiting instructions, the United States Supreme Court said in *Opper v. United States*, 348 U.S. 84, 95 (1954):

"The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. [footnote omitted]. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions."

To the same effect, the United States Supreme Court said in *Delli Paoli v. United States*, *supra*, at 242:

"It is a basic premise of our jury system that the court states the law to the jury and the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

With regard to the impact which the former California practice may have had on the integrity of the fact-finding process at trial, it is significant to note the limitations which that practice imposed on the admissibility of such statements even when attended by appropriate limiting instructions. The use of such statements in a joint trial was carefully circumscribed to avoid prejudice to the non-confessing codefendants. "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *People v. Foote*, 48 Cl.2d 20, 23 (1957). See also, *People v. Chavez*, 50 Cal.2d 778, 790 (1958); *People v. Zamora*, 66 Cal. App.2d 166, 211-12 (1944).

We submit, therefore, that the former California practice was attended by effective safeguards which ensured the integrity of the truth-determining process at trial. Under these circumstances, the probabilities that this former practice resulted in any improper convictions is extremely small and furnishes little support for a decision that *Bruton* should be applied retroactively. Particularly so, when these limited probabilities are weighed against the prior justified reliance upon the old standard and the tremendous impact which retroactivity would have upon the administration of justice not only in state courts but in the federal system.

That reliance upon the old standard was justified and reasonable cannot be denied. Indeed, not only was the former state practice considered consistent with

due process but it conformed to the rule of evidence consistently sanctioned by the United States Supreme Court in its supervisory role over the federal courts prior to its decision in *Bruton*. *United States v. Ball*, 163 U.S. 662, 672 (1896). *Opper v. United States*, *supra*; *Delli Paoli v. United States*, *supra*. Such decisions are operative facts and the consequential reliance upon them by state and federal courts and prosecutors cannot justly be ignored. The thousands of cases that were decided in reliance upon them should not be obliterated. A newly defined constitutional right which now prohibits a state and federal trial procedure that previously had the express sanction of the United States Supreme Court should not be applied retroactively. To do so would not only impose impossible burdens upon the administration of criminal justice, but would have a devastating effect upon the confidence of the bench, the bar, and the general public in the courts.

Moreover, it is common knowledge that numbered among those prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons who are under long-term sentences as habitual offenders. It is these hardened and dangerous criminals under long-term sentences whose cases would afford the least likelihood of a successful retrial. To require a general release of such undeniably guilty prisoners would cripple the orderly administration of the criminal law. We respectfully submit that this Court should hold that the doctrine of *Bruton v. United States* is not available to attack a judgment of conviction secured in a trial which became final prior to the date of that decision.

## III

*In Any Event, it is Clear That the Use of Petitioner's  
Codefendant's Statement, While Error as to Petitioner  
Under the New Standard, was Harmless Beyond  
A Reasonable Doubt.*

Assuming, *arguendo*, that this Court decided to consider petitioner's claim without remanding him to the state courts, and assuming, *arguendo*, that this Court concludes that the standard adopted in *Bruton* should be applied retroactively, nevertheless, the order to show cause should be discharged and the petition denied because it is clear that the use of petitioner's codefendant's statement, while error as to petitioner under the new standard, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). It is readily apparent from a review of the transcript of the state trial proceedings that the statement by petitioner's codefendant Runnels played an insignificant role in persuading the jury of *Runnels'* guilt and probably played no role at all in persuading the jury of *petitioner's* guilt. As detailed in the Statement of Facts submitted with this supplemental return, both petitioner and his codefendant Runnels were identified by the victim. Both petitioner and Runnels were apprehended in the victim's automobile after petitioner had been observed throwing a gun from the window of the vehicle. The defense presented at trial was literally an insult to the intelligence of the jury. We submit that under the circumstances of this case as portrayed in the record of the state trial it is clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The State Court of Appeal concluded that "in view of the overwhelming evidence of O'Neil's guilt, it is not reasonably probable that a result more favorable to O'Neil would have been reached had Runnels' confession been excluded." This standard is, of course, not the standard articulated in *Chapman* but then the error which the court then considered was no more than a violation of a state evidentiary rule. There seems little question that the Court of Appeal would have reached the further conclusion that the state had proved beyond a reasonable doubt that the error did not contribute to the verdict obtained had that been the standard the Court of Appeal was then required to apply.

### *Conclusion*

For the foregoing reasons, we respectfully submit that the order to show cause heretofore issued by this Court on April 23, 1968, should be discharged and the petition for habeas corpus denied.

Dated: June 10, 1968.

Thomas C. Lynch, Attorney General  
of the State of California,  
Albert W. Harris, Jr.  
Assistant Attorney General  
Derald E. Granberg,  
Deputy Attorney General  
Attorneys for Respondent.

Original Filed June 10, 1968,  
Clerk, U.S. Dist. Court,  
San Francisco.

United States District Court  
Northern District of California

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No. 49,136

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Joe J. B. O'Neil,

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

SECOND SUPPLEMENTAL RETURN TO  
ORDER TO SHOW CAUSE AND ADDITIONAL  
POINTS AND AUTHORITIES IN  
OPPOSITION TO PETITION FOR  
WRIT OF HABEAS CORPUS.

On May 17, 1968, we filed our initial return to the order to show cause issued by this Court in this matter. Relying upon *Delli Paoli v. United States*, 352 U.S. 232 (1957), we argued that petitioner had presented no federal question. On May 20, 1968, three days after the filing of our return, the United States Supreme Court decided *Bruton v. United States*, 36 U.S.L. Week 4447, in which it overruled *Delli Paoli*.

Having thus been undermined by the Court's innovative decision in *Bruton*, we thereafter on June 10,

1968, filed a supplemental return to the order to show cause in which we presented three additional arguments. First, we argued that in the wake of *Bruton*, petitioner may now have a remedy in the state courts and, therefore, his present application should be denied and he should be directed to the state courts. Second, we argued that in any event *Bruton* should not be applied to cases which had become final prior to the date of that decision. And third, we argued that even assuming that petitioner could rely upon the change in law effected by *Bruton*, any error under the new standard was harmless beyond a reasonable doubt in his case.

On June 10, 1968, the day our supplemental return was filed, the United States Supreme Court rendered a per curiam decision in *Roberts v. Russell*, 36 U.S.L. Week 3472, in which it held that *Bruton* was applicable to the states and that it was to be given full retroactivity. Thus, the second argument submitted in our supplemental return has been undermined by another decision of the Supreme Court. Although neither this decision nor *Bruton* is yet final, whether they continue or not need not influence the decision in this case. Our first and third arguments, stand unimpaired as of this date and we believe continue to afford persuasive reasons why petitioner's application for habeas relief should be denied.

### *Conclusion*

For the foregoing reasons, we respectfully submit that the order to show cause heretofore issued by this

Court on April 23, 1968, should be discharged and the petition for habeas corpus denied.

Dated: June 13, 1968.

Thomas C. Lynch, Attorney  
General of California,

Albert W. Harris, Jr.,  
Assistant Attorney General.

Dorald E. Granberg,  
Deputy Attorney General,  
Attorneys for Respondent.

DEG:eo

SF CR 008537

Original filed June 13, 1968,  
Clerk U.S. Dist. Court,  
San Francisco.

In the United States District Court  
Northern District of California

Case No. 49,136

Joe J. B. O'Neil,	} Petitioner,
vs.	
Louis S. Nelson, Warden,	

PETITIONER'S TRAVERSE TO  
RESPONDENT'S RETURN TO ORDER  
TO SHOW CAUSE.

To: The Honorable Albert C. Wollenberg, Judge of  
the above entitled Court.

Comes Joe J. B. O'Neil, petitioner in the above entitled caption with his traverse to respondent's return to order to show cause, issued out of this Court April 25, 1968, being returnable May 20, 1968, with June 21, 1968 being deadline for filing of the traverse; and states supporting facts as follows:

*Opening Statement*

Initially, it is hoped that close scrutinization be given this application, as its preparations was undertaken by an unskilled layman.

Respondent's contentions that the facts of this case does not present a Federal question, obviously is a

tacit admission of his difficulty for placing the facts in an orderly legal form. The only argument presented by respondent (Petitioner's application present no Federal question), is readily disputed by issuance of the order to show cause. However, petitioner will endeavor to amplify his contentions in the pages to follow.

### *Opposition to Respondent's Return*

Respondent fail to demonstrate how petitioner was lawfully convicted within the premise of the due process requirement, and his argument that no federal question is prevailing is equally without basis. Conceded that severance of the cause and appropriate deletion of a codefendant's confession might have been a state court procedure. Surely, even state courts must recognize their own law and the ill-effects of a codefendant's confession.

Because of the stringent rules governing admissibility of confessions (*People v. Polk*, 62 A.C. 962; *Escobedo v. Illinois* (1964) 378 U.S. 478), incriminating confessions have been deemed inadmissible in evidence. The California state courts have extended this rule to encompass situations such as petitioner's *People v. Aranda* (1965) 63 Cal. 2d 518, 530, 531. Although this case was decided subsequent to petitioner's conviction, the district court of appeal ruled that Aranda had no retroactive effects to trials conducted prior to November 12, 1965. On the contrary, the State Supreme Court in *People v. Boddie and Charles*, Crim. NO. 9657, 66 A.C.A. (April 4, 1967, which was cited in petitioner's application for rehearing on April

26, 1967, and *People v. Massie and Vetter*, Crim. 9506 (June 21, 1967); ruled that Aranda would be applied retroactively. On the basis of these decisions, Petitioner in January, 1968, submitted to the district court of appeal his application to recall the remittitur, and this application was denied without comment on February 7, 1968.

Confident that his cause was meritorious, petitioner submitted an application for a writ of habeas corpus in the State Supreme Court and it too was denied without comment. Thus, even if it be conceded as respondent contends, that the court's failure to sever the trials, or to delete Runnels' confession does not present a federal question. The continuing flow of decisions rendered by California courts dealing with the instant situation, purports the necessity for fair play in admitting incriminating codefendants confessions in evidence against a nondeclarant defendant. See for example, *People v. Matols*, C.A. 2d. 2 Crim. 13414, (Feb. 29, 1968). In that case defense counsel motioned for severance of the trials. The prosecuting attorney promised that he would delete that portion of the codefendant's confession which related to Matola. However, during the trial parts of the confession which related to Matola came out, and the prosecuting attorney himself got Matola's codefendant to admit they were together during commission of the crime. The court reversed the conviction because, even though, the trial court could not foresee these contingencies, it improperly denied the motion to sever the trials.

It is abundantly clear that state courts have great respect for the holdings in *People v. Aranda*, supra,

as that case was cited in detail by the state Supreme Court in *Matola* and in *Massie and Veeter*. Yet, Aranda's implications were not extended to petitioner when he sought a rehearing by the district court of appeal; when he sought to recall the remittitur, or habeas corpus relief.

Even more recently, State courts have left no doubt as to the retroactiveness of the Aranda decision. In (*People v. Chapman*, C.A. 3rd. 3 Crim. 4665, April 15, 1968) for example, that court observed: "The Aranda rule represents a palpable change in California standards for the consolidation and severance of criminal trials, since prior case law had proceeded on the assumption that juries could be effectively admonished to disregard evidence admitted against less than all of a group of jointly tried defendants. (See *People v. Chambers* (1964) 231 Cal. App. 2d 23, 32-33.) The new rule is retroactively available to a defendant who has been tried prior to the date of the Aranda decision, November 12, 1965, where (as is true of Mrs. Chapman) the conviction was pending on appeal on that date. (*People v. Charles* (1967) 66 Cal. 2d 330, 332.)"

One would justifiably wonder why, in view of all of his efforts petitioner was not afforded state relief. Under these circumstances State courts were afforded ample opportunity to rectify the defect. And because of their failure to do so, the harmless error rule relied upon by respondent has no application to the instant case, because this practice has been deemed unsound law by federal and state courts.

Obviously, these factors entail federal intervention under Rule 52 of the Federal Rules of Criminal Procedure: "(b) Plain Error: Plain errors of defect affecting substantial rights may be noted although they were not brought to the attention of the court." See also *Gram v. United States* (4th Cir., 1954) 272 F. 2d 567, 570-571: "Just as rule 14 does not permit the government to circumvent the prohibition of rule 8(a), neither does the harmless error rule, rule 52(a), have this effect. The error here was no mere technicality. . . . It is not "harmless error" to violate a fundamental procedural rule designed to prevent mass trials." See also *United States v. Thompson* (4th Cir., 1940) 113 F. 2d 643, 646: "Other courts have applied harmless error rules, but have held that improper denial of a separate trial is itself a miscarriage of justice, because (a) the result under the *proper mode* of trial cannot be guessed; (b) the record cannot be expected to reveal such hidden prejudicial effects of a joint trial as consideration against the defendant of evidence admitted only as against codefendants, inhibition of the presentation of defense evidence, and guilt by association; and (c) the prejudicial impact of these effects cannot be measured, but may be assumed to be substantial".

Respondent would lead this Court to believe that petitioner is not entitled to protection under state procedures. If this be correct, petitioner, is indeed properly before this Court, and his argument encompass a federal question where he has been denied equal protection of the law by state courts.

In April, 1967, petitioner filed a timely application for rehearing in the district court of appeal, second Appellate district, division one. In that application he pointed out that under the decision of *People v. Boddie and Charles*, (April 4, 1967) Crim. No. 6957, 66 A.C., the Supreme Court deemed that Aranda would have retroactive effect to convictions not then final. *People v. Banks*, 238 A.C.A., and *People v. Marbury*, 63 C. 2d 574, also were decided on the Aranda principle. As noted by respondent's return, that Application was denied on April 26, 1967. Petitioner's conviction did not become final until April 30, 1967.

This, respondent improperly contend that the harmless error rule is effective, or that petitioner fail to present a federal question. Furthermore, this Court is not only concerned with the trial court's refusal to sever the trials, or the proper deletion of Runnels' confession. But it is concerned with the consequence of a codefendant's statement when it is presented to a jury against a nondeclarant defendant. This Court is dealing with due process and equal protection of the law. The fact that Runnels' confession was elaborated on before the jury took from these stringent requirements. Thus, in view of the state court's failure to rectify the defect after petitioner had properly applied for relief, federal standards are prevailing and have long since been recognized as a detrunicate for the instant situation. See *Cupo v. United States* (D.C. Cir., 1966) 359 F. 2d 990, 993; *Schaffer v. United States* (1960) 362 U.S. 311, 321; *Cross v. United States*, 331 F. 2d 85.

Recently, the federal courts clarified petitioner's situation by observing that: "The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. *Jones v. United States*, U.S. App. D.C. ...., 342 F. 2d 863; *Greenwell v. United States*, ..... U.S. App. D.C. ...., 336 F. 2d 962; *Barton v. United States*, 263 F. 2d 894.

Federal standards with respect to joint trials such as the instant case, are governed by Rule 8(b) and 14 of the Federal Rules of Criminal Procedure: "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial". See *Daley v. United States*, 231 F. 2d 123, 125.

In this case Petitioner was not afforded the benefits of these rules. The officer who took Petitioner's co-defendants confession, recited it before the jury by memory, as it was not a written confession. Although Petitioner's co-defendant took the witness stand and denied giving the confession, it's easy to see, in view of the insufficient evidence, that the confession was instrumental in the conviction. Quoting: "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact rec-

ognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." *Crawford v. United States*, 212 U.S. 183, 204; *Caminetti v. United States*, 242 U.S. 470, 495; *Stoneking v. United States*, 232 F. 2d 385.

The basic principle denouncing the use of confession against a non-declarant defendant, was discussed at length in *Jackson v. Denno*, 378 U.S. 368. That case intelligently observed the burden placed upon the jury as: "A jury cannot segregate evidence into separate intellectual boxes. . . . It cannot determine that a confession is true insofar as it admits that *A* has committed criminal acts with *B*, and at the same time effectively ignore the inevitable conclusion that *B* has committed those same criminal acts with *A*."

Obviously, the recent decision of *Bruton v. United States*, No. 705 (May 20, 1968) reflect probative significance to Petitioner's situation, where the trial judge, there, as in this case, instructed the jury: "A confession made outside of court by one defendant may not be considered as evidence against the other defendant who was not present and in no way a party to the confession." On the contrary, the Supreme Court observed in *Bruton*; while overturning *Delli Paoli v. United States*, 352 U.S. 232; that: "Several cases since *Delli Paoli* have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions; see, e.g., *United States ex rel. Floyd v. Wilkins*, 367 F. 2d 990; *United States v. Bozza*, 365 F. 2d 206."

Clearly, both federal and state criteria has been overridden in this case, thus rendering Respondent's argument completely unsupported. There seems little doubt as to the necessity for rectification in this case and with this fact established. The conviction should be reversed.

Accordingly, it is for these reasons respectfully submitted by your Petitioner.

Subscribed and sworn to before me this 17 day of June, 1968.

(Seal)

Charles R. Parker,  
Notary Public in and for the  
County of Marin,  
State of California.

/s/ Joe B. O'Neil,  
Joe J. B. O'Neil,  
P. O. Box A-90909  
Tamal, California.

Filed June 21, 1968,  
James P. Welsh, Clerk.

In the United States District Court  
Northern District of California

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Case No. 49,136

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Joe J. B. O'Neil,	} Petitioner,
vs.	
Louis S. Nelson, Warden,	

PETITIONER'S OPPOSITION  
TO RESPONDENT'S SUPPLEMENTAL  
RETURNS

To: The Honorable Albert C. Wollenberg, Judge of  
the above entitled Court.

Comes Joe J. B. O'Neil, petitioner in the above  
entitled caption in opposition to respondent's supple-  
mental returns to the order to show cause, issued by  
this Court; and states supporting facts as follows:

*History of the Case*

The order to show cause was issued by this Court  
on April 25, 1968, being returnable on May 20, 1968,  
and respondent promptly returned on that date. In  
said return respondent contended that petitioner  
failed to present a federal question and relied on the  
holding in *Delli Paoli v. United States*, 352 U.S. 232  
(1957), for the purported proposition that a jury

could discern the limited instruction rule as to the declarant defendant only.

On June 10, 1968, respondent submitted his supplemental return in light of the recent holding in *Bruton v. United States*, 36 U.S.L. Week 4447, in which he contended that petitioner was not entitled to retroactive application of the *Bruton* decision.

On June 13, 1968, respondent submitted his second supplemental return. This supplement was presented in light of the even more recent Supreme Court decision in *Roberts v. Russell*, 36 U.S.L. Week 3472, decided June 10, 1968, where the Court asserted that *Bruton* would be applied retroactively.

#### *Opposition to Respondent's Supplemental Return*

Even though petitioner is satisfied that his traverse sufficiently combats respondent's return and both of his supplemental returns, he feels a compulsion to rectify vital errors which were committed by respondent and will endeavor to do so in the following pages.

On page 7 of respondent's supplemental return, the caption reads: "Petitioner Has Failed to Exhaust his Available State Remedies". Respondent went on to state that: "Although petitioner has presented an application for habeas relief to the State Supreme Court in which he raises the issues which he presents in his application to this Court, that application was presented and denied prior to the change in law effected by the United States Supreme Court by its decision in *Bruton*. In light of the change in law

effected by Burton, petitioner may now have a remedy in the State Courts. In any event, the State Courts should be permitted to pass preliminarily on that question and we, therefore, for this reason urge this Court to discharge the order to show cause and to deny petitioner's application for federal habeas relief".

Several important factors were conveniently deleted from the preceeding account. Initially, it should be noted that petitioner was convicted on June 17, 1965. On November 12, 1965, *People v. Aranda*, 63 C. 2d 518, was decided. Petitioner appealed his conviction to the California Court of Appeal Second Appellate and the conviction was affirmed on March 30, 1967, in an opinion which indicated that Aranda's requirements was inapplicable to cases tried before November 12, 1965. On April 4, 1967, a few days subsequent to the judgment affirmance, the California Supreme Court filed its opinion in *People v. Boddie and Charles*, Crim. No. 9657, 66 A.C.A., which indicated the requirements of *Aranda* were retroactive to convictions which were not final as of November 12, 1965. A few days after learning of this decision, petitioner, in April, 1967 filed a timely application for rehearing citing its implications as authority. On April 26, 1967, that application was denied without comment.

On the authority of the California Supreme Court decision in *People v. Massie and Veeter*, Crim. 9506 (June 21, 1967), petitioner sought to recall the remittitur in the California district Court of appeal, and that application was also denied without com-

ment. Exhausted, but driven by hopes of an eventual win, petitioner tendered his habeas corpus application in the State Supreme Court and it too was denied without comment. However, the state court has not ceased to apply the principals of the *Aranda* decision retroactively, and on April 15, 1968, even extended its implications back as far as November 12, 1965 in (*People v. Chapman*, C.A. 3d, 3 Crim. 4665), when *Chapman* was still pending on appeal.

Obviously, State courts completely disregarded the implications of *People v. Boddie and Charles*, supra, when petitioner tendered his timely application for rehearing, and yet the standards of *Aranda* was applied retroactively to the *Chapman* case on April 15, 1968. In view of these important factors, respondent has failed to state a sufficient or even valid claim, that "petitioner has failed to exhaust his available state remedies", when petitioner has in fact over emphasized the necessity for state courts intervention and has received no response whatever.

In respondent's second supplemental return he enumerated the reasons why petitioner should be denied federal habeas relief as follows: "First, we argued in the wake of *Bruton*, petitioner may now have a remedy in the state courts and, therefore, his present application should be denied and he should be directed to the state Courts. Second, we argued that in any event *Bruton* should not be applied to cases which had become final prior to the date of that decision. And third, we argued that even assuming that petitioner could rely upon the change in law effected

by *Bruton*, any error under the new standard was harmless beyond a reasonable doubt in his case".

Respondent's initial argument is obviously dispelled by state courts failure to rectify petitioner's situation through the many opportunities they were afforded. Respondent's second argument is dispelled by the fact that the Supreme court has rendered at least two decisions subsequent to *Bruton*, in which both represents retroactive application. See *Roberts v. Russell*, U.S.L. Week; *Pickens v. U.S.*, 36 U.S.L. Week \_\_\_\_\_, decided June 10, 1968. Respondent's third argument is dispelled by the fact that *Bruton* merely reaffirmed an evidentiary rule which has long been in practice. See *Bruton v. United States*, No. 705 (May 20, 1968). Quoting: "We emphasize that the hearsay statement inculpatory petitioner was clearly inadmissible against him under traditional rules of evidence, *Krulewitch v. United States*, 336 U.S. 440; *Fiswick v. United States*, 329 U.S. 211".

Why should it be assumed that the jury in petitioner's case was capable of disregarding the codefendants' statement which implicated him. In *Bruton*, the Court observed: "We therefore overrule *Delli Paoli* and reverse. The basic premise of *Delli Paoli* was that it is reasonably possible for the jury to follow sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime".

Thus respondent cannot delve into the conscience of the jurors and state that the incriminating effects of

Runnel's confession was not considered against petitioner. State courts have failed in their obligations to safeguard petitioner's rights to due process and equal protection of the law, and whether or not *Bruton* maintains its retroactive effects, state courts should not be afforded another opportunity. Obviously, respondent's argument is insignificant to the true facts of this case and this Court should rightly proceed according to the Supreme Court's intended proposition in *Bruton*, and the decisions closely followed by it, and thus grant the relief sought by your petitioner.

Accordingly, it is for these reasons respectfully submitted by your petitioner.

Subscribed and sworn to before me this 24 day of June, 1968.

/s/ Joe J. B. O'Neil,  
Joe J. B. O'Neil,  
P.O. Box A-90909,  
Tamal, California.

[Seal]

Charles R. Pahrman,  
Notary Public in and for the  
County of Marin, State of  
California.

In the United States District Court for the  
Northern District of California

Case No. 49,136

Joe J. B. O'Neil,

Petitioner,

vs.

Louis S. Nelson, Warden,

Respondent.

ORDER GRANTING WRIT  
OF HABEAS CORPUS

Petitioner, Joe J. B. O'Neil, is imprisoned in the California State Prison at San Quentin, California pursuant to judgment of the Superior Court of the State of California in the County of Los Angeles dated June 17, 1965. The judgment reflects that petitioner was convicted by jury of the felonies of kidnapping for the purpose of robbery, robbery in the first degree and vehicle theft. Petitioner appealed his convictions to the California Court of Appeal and they were affirmed by that Court on March 30, 1967. Petition for rehearing of the appeal was denied April 26, 1967, and an application to recall the remittitur was denied by the Court on February 7, 1968. Thereafter petitioner filed an application for habeas corpus with the California Supreme Court on March 7, 1968, which was denied by that Court without opinion March 20, 1968.

The Court issued its order to show cause herein to the respondent on April 23, 1968. Thereafter, on May 17, 1968, the return to the order to show cause was filed herein by the Attorney General of the State of California in which return respondent argued that petitioner had presented no federal question, relying on the 1957 U.S. Supreme Court case *Delli Paoli v. United States*, 352 U.S. 232 (1957). On May 20, 1968, the U.S. Supreme Court decided *Bruton v. United States*, \_\_\_\_\_ U.S. \_\_\_\_\_, to be found at 36 U.S.L. Week 4447, in which it expressly overruled the *Delli Paoli* case. Accordingly, the Attorney General on behalf of the respondent, filed a supplemental return on June 10, 1968, and a second return on June 13, 1968, after the U.S. Supreme Court on June 10 rendered a per curiam decision in *Roberts v. Russell*, 36 U.S.L. Week, 3472.

It is without question herein that the rule laid down in the *Bruton* case applies to our problem. The petitioner's co-defendant, one Runnels, having made a confession implicating petitioner, the confession having been admitted at the trial and submitted to the jury. It is also clear that the case of *Roberts v. Russell* holding that *Bruton* is applicable to the states and is to be given full retroactivity likewise applies to the problem here.

The respondent, therefore, is left to rely upon two points which he vigorously argues to this Court in his supplemental return filed on June 10, 1968:

- 1) that petitioner has failed to exhaust his available state remedies, and,

2) that in any event, the use of petitioner's codefendant's statement, while error as to petitioner, was harmless beyond a reasonable doubt.

It is the opinion of this Court that each of these contentions can be readily disposed of.

1) Petitioner has presented his application to the State Supreme Court and in that application he raises the issues which are now before this Court. It is true that that application was presented and denied prior to the decisions of the U.S. Supreme Court in *Bruton* and *Roberts*. The Attorney General requests that in light of the change in law effected by *Bruton*, the state court should be permitted to pass on that question. In this regard, it is to be noted that the date of petitioner's conviction was June 17, 1965 and that the Supreme Court of California thereafter on November 12, 1965 in the case of *People v. Aranda*, 63 Cal.2d 518, established a state rule of practice in accordance with the subsequent rule of the Supreme Court of the United States in *Bruton*. Thereafter the Supreme Court of California reviewed petitioner's application for writ of habeas corpus filed with it on March 7, 1968 and denied without opinion this application on March 20, 1968. The Attorney General has filed with this Court, petitioner's application to the Supreme Court of California, a reading of which will indicate that he raised the same issue in that application as he set forth herein. It should be noted here that the Supreme Court of California in the case of *People v. Charles*, 66 Cal.2d 330 (1967) held that the rule established in *Aranda* did not require its

application to convictions which had become final. Petitioner's conviction, as indicated above, had occurred on June 17, 1965. It may also be noted that the U.S. Supreme Court on June 10, 1968 decided *Roberts v. Russell*, *supra*, in which case the *Bruton* rule was made applicable to the states and given full retroactivity. Under all these circumstances, it is the opinion and belief of this Court that petitioner herein has exhausted his remedies, his petition having been filed in this Court on May 17, 1968, prior to both the *Bruton* and *Roberts* opinions of the U.S. Supreme Court.

2) The Court is also of the opinion, after a review of the entire record herein, including the transcript of petitioner's trial in the Superior Court and all of the evidence therein that it can not apply the rule in *Chapman v. California*, 386 U.S. 18 (1967) and determine that the statement admitted into evidence by petitioner's co-defendant was harmless error and that the state had proved beyond a reasonable doubt that this error did not contribute to the verdict obtained. It is true that petitioner was identified by the victim of the crimes of which he was convicted and that the identifications were positive as far as the record was concerned, further, that he did have possession of the victim's automobile at the time of his arrest and that the trial court concededly gave clear instructions to the jury to disregard the co-defendant's inadmissible evidence inculcating petitioner. This Court can not at this time second guess what the jury may have considered or not considered in arriving at its guilty verdicts. The record indicates

that both the co-defendant and petitioner testified that they produced other witnesses who testified to their presence elsewhere at the approximate time of the robbery and kidnapping and testified themselves denying the crime, as well as attempting to explain certain of the evidence against them. It is true that the jury may not have believed any of these witnesses offered by the defendants or the defendants themselves and if this is so, then the evidence is overwhelming against them and they are guilty beyond a reasonable doubt, but if the jury gave consideration to this defense evidence, then it can not be said beyond a reasonable doubt that petitioner was not prejudiced and in the context of the joint trial was not deprived of a fair trial because of the inadmissible evidence and the deprivation of his rights to cross-examination in the context of the joint trial.

Accordingly, the petitioner is ordered discharged from the custody of the respondent, execution of this order is stayed ten (10) court days to allow the Attorney General to file, if he so desires, notice of appeal. Should such notice of appeal be filed within a period of the above indicated stay, it shall be further stayed and the custody of the petitioner shall not be disturbed until a further order of this Court.

Dated: July 12, 1968.

**Albert C. Wollenberg,**  
**United States District Judge.**  
**Original filed July 12, 1968,**  
**Clerk, U.S. Dist. Court,**  
**San Francisco.**

United States District Court  
Northern District of California

Case No. 49,136

Joe J. B. O'Neil,	Petitioner,
vs.	
Louis S. Nelson, Warden,	Respondent.

**CERTIFICATE OF PROBABLE CAUSE**

Pursuant to Title 28, United States Code section 2253, the Court hereby certifies that there is probable cause for an appeal in the above entitled case.

Dated: July 22, 1968.

Albert G. Wollenberg,  
United States District Judge.  
Original filed July 22, 1968,  
Clerk, U.S. Dist. Court,  
San Francisco.

United States District Court  
Northern District of California

Case No. 49,136

Joe J. B. O'Neil,

vs.

Louis S. Nelson, Warden,

Petitioner,

Respondent.

NOTICE OF APPEAL

Notice Is Hereby Given that Louis S. Nelson, Warden of the California State Prison at San Quentin, California, and the People of the State of California, respondent-appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order and final judgment granting petition for writ of habeas corpus entered in this action on July 12, 1968.

Dated: July 19, 1968.

Thomas C. Lynch, Attorney  
General of California,

Albert W. Harris, Jr.,  
Assistant Attorney General,

Derald E. Granberg,  
Deputy Attorney General,  
Attorneys for Respondent.

Original filed, July 22, 1968,  
Clerk, U.S. Dist. Court,  
San Francisco.

United States Court of Appeals  
for the Ninth Circuit

No. 23149

Joe J. B. O'Neil,	} Plaintiff-appellee,
vs.	
Louis S. Nelson, Warden,	
Defendant-appellant.	

Appeal from the United States District Court  
for the Northern District of California

**JUDGMENT**

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Jan. 26, 1970.

United States Court of Appeals  
for the Ninth Circuit

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Joe J. B. O'Neil,

Plaintiff-Appellee,

vs.

Louis S. Nelson, Warden,

Defendant-Appellant.

No. 23,149

[January 26, 1970]

Appeal from the United States District Court  
for the Northern District of California

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Before: Browning and Duniway, Circuit Judges, and  
Solomon\*, District Judge

Duniway, Circuit Judge:

O'Neil is a California prisoner, convicted on two counts under the California Penal Code, kidnapping for purposes of robbery (§ 209) and robbery in the first degree (§ 211), and vehicle theft (Cal. Veh. Code § 10851). On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court, which granted the writ. The warden appeals (28 U.S.C. § 2253).

1. *The facts.*

The District Judge made his ruling on the basis of the record of the California trial. This is what that

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\*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

record shows. O'Neil was tried with his alleged partner in the crimes, Roosevelt Runnels. The prosecution presented three witnesses, the victim and two policemen. The victim testified that while he was waiting for his wife in a grocery store parking lot the defendants entered his car at gunpoint. They took about eight dollars from his wallet, forced him to drive several blocks from the market and get out of his car, and then drove away.

One of the policemen testified that later the same evening he had responded to a call from a liquor store operator who was suspicious of a white Cadillac circling the block outside his store. When the squad car followed the Cadillac, one of its occupants threw a gun out of the window. The police stopped the car and arrested its occupants. The car belonged to the victim; its occupants were the defendants.

The other policeman testified (over objection) to a statement made to him by O'Neil's co-defendant Runnels two days after the arrest. Runnels' purported statement coincides almost exactly with the victim's story so far as they overlap, but gives considerable credit to O'Neil for masterminding and directing the day's work. Runnels is alleged to have said that O'Neil came to his place in the afternoon before the robbery and asked him if he wanted "to make a couple of hits," and that after the occurrence in question they decided to drive over to rob the liquor store, and were circling outside waiting for the customers to leave when they were arrested.

Both defendants relied almost entirely on an alibi. Each took the stand and testified that they had been

at O'Neil's house at the time of the robbery, and that they had been given the car to drive an acquaintance without warning that it did not belong to him. Several defense witnesses corroborated parts of the story. Runnels flatly denied having made the statement to the policeman, both on direct and cross-examination.

O'Neil's counsel did not cross-examine Runnels. He was trying to establish the same alibi to which Runnels was testifying and obviously did not want to ask about the veracity of an out-of-court statement that both he and Runnels wished to convince the jury had never been made. The efforts of the prosecutor to trip up Runnels were to no avail; he flatly and consistently denied having made the statement. Presumably, if O'Neil's counsel had cross-examined on the subject, the result would have been the same.

Before the officer testified about the statement of Runnels, the court instructed the jury as follows:

"Before you relate the conversation, I will instruct the jury that this statement is to be received and considered by the jury only as to the Defendant Runnels, the one who was making the statement, and is not to be considered by the jury in any manner as against his co-defendant, Defendant O'Neil."

## 2. *Violation of the Bruton rule.*

At the close of the prosecutor's case, there was presented the exact situation that was condemned by the Supreme Court in *Bruton v. United States*, 1968, 391 U.S. 123, made fully retroactive in *Roberts v. Russell*, 1968, 392 U.S. 293. The warden argues, however, that the *Bruton* error was cured because Run-

nels took the stand and so was available for cross-examination by counsel for O'Neil. Thus there was an opportunity to confront and cross-examine Runnels, lack of which is the basis for the *Bruton* decision. See *Parker v. United States*, 9 Cir., 1968, 404 F.2d 1193.

We think that in this case the error was not cured. The Court in *Bruton* relied heavily on its earlier opinion in *Douglas v. Alabama*, 1965, 380 U.S. 415. It is significant to note the use made of that case in *Bruton*. In *Douglas*, the statement of a convicted comrade in the crime (Loyd) was introduced to "refresh the memory" of Loyd when the state called him to the stand. It was presented in questions, piece by piece, over strong objection and despite Loyd's absolute refusal to testify. In *Bruton* this near-misconduct (or dereliction of judicial duty) aspect of the case was not relied upon and the Court said:

"We noted [in *Douglas*] that 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. . . .'"

It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not "affirm the statement as his"; he flatly denied making it. Under these circumstances, while the statement was admissible against Runnels, both as an admission or confession and for impeachment, it never became admissible against O'Neil. Yet it remained in the record, and *Bruton* tells us that the court's instruction to the jury is, as a matter of law, ineffective.

The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all.

The only circuit that has squarely faced the question presented by this case is the Sixth. In *Townsend v. Henderson*, 6 Cir., 1968, 405 F.2d 324, a co-defendant's confession was admitted in a trial for jailbreaking. In reversing denial of habeas corpus, the court said:

"The only possible distinction between the present case and *Bruton* is that in *Bruton* the co-defendant did not take the witness stand, whereas here Terry did testify in his own behalf. But, this distinction is unimportant since, although Terry was called as a witness, he denied making the confession. Townsend therefore had no effective right of cross-examination in regard to the confession. A similar question was presented in *Douglas v. Alabama*, 380 U.S. 415 . . . (1965), and it was there held 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his.'" (405 F.2d at 329)

See also *West v. Henderson*, 6 Cir., 1969, 409 F.2d 95.

A number of circuits, including this one, have considered the application of *Bruton* in cases in which a co-defendant has taken the stand after the introduction of his out-of-court statement. But the cases that have rejected challenges under the *Bruton* rule have been careful to emphasize that effective cross-examination was possible, and usually, that it actually occurred.

In *Santoro v. United States*, 9 Cir., 1968, 402 F.2d 920, the three co-defendants whose out-of-court statements were introduced took the stand and were examined and cross-examined at length:

"Thus, appellant's three codefendants took the stand and each testified regarding the subject of his or her out-of-court statements which implicated appellant. On this ground we distinguish *Bruton* . . . ." (402 F.2d 922.)

In *Rios-Ramirez v. United States*, 9 Cir., 1969, 403 F.2d 1016, cert. denied, 394 U.S. 951, we said:

"As in *Santoro*, and contrary to the case in *Bruton*, defendant Manzano in the present case took the stand and testified regarding the subject of her out-of-court statements. Much of her direct testimony concerned appellant Rios-Ramirez."

. . . . .

"Thus, appellant not only had an opportunity to confront the person whose statements inculpated him, but he in fact took advantage of this opportunity . . . ." (1017)

In *Ignacio v. Guam*, 9 Cir., 1969, 413 F.2d 513, we summarized our holdings in *Santoro* and *Rios-Ramirez*:

"In both *Rios-Ramirez* and *Santoro* we found the rule of *Bruton* inapplicable because the co-defendants whose out-of-court statements were used to incriminate petitioners Rios-Ramirez and Santoro all took the stand and testified regarding the subject of their extrajudicial declarations." (515)

*Ignacio*, however, was decided on harmless error grounds.

*Parker v. United States*, 9 Cir., 1968, 404 F.2d 1193, is not to the contrary. There we pointed out that "[j]oint trials of persons charged together with committing the same offense or with being accessory to its commission are the rule, rather than the exception. There is a substantial public interest in this procedure. . . ." (1196) In rejecting the *Bruton* argument we said:

"[S]ome of the facts mentioned in the out-of-court statements . . . were also proved by direct testimony. Others were merely small bits and pieces of a larger picture and can hardly have had any substantial effect upon the verdict. Finally, Orlando took the stand and was subject to cross-examination." (Citing *Santoro and Rios-Ramirez*.)

We also rejected Parker's argument that he had no right to cross-examine his co-defendant. Most of the evidence about which Parker was complaining came from the mouths of the co-defendants on the witness stand. That which came from the recital by F.B.I. agents of out-of-court statements was of minor importance. In essence, *Parker* is a harmless error case.

In *United States v. Elliott*, 9 Cir., 1969, \_\_\_\_ F.2d \_\_\_\_, (Nos. 23,646 and 23,647, decided October 31, 1969), there was no out-of-court statement. The defendant was objecting to the direct testimony of a partner in crime. Again we emphasized the adequacy of the cross-examination:

"In this case, Henne appeared in court, testified, and was subjected to extensive cross-examination by Elliott's counsel; thus, there was full confrontation."

Other circuits, in rejecting challenges under *Bruton*, have been careful to distinguish the situations before them from the situation in this case. See, e.g., *United States v. Ballentine*, 2 Cir., 1969, 410 F.2d 375; *United States v. Jackson*, 6 Cir., 1969, 409 F.2d 8; *United States v. Lipowitz*, 3 Cir., 1969, 407 F.2d 597; *Lewis v. Yeager*, 3 Cir., 1969, 411 F.2d 414.

### 3. Harmless error.

The warden urges that if the *Bruton* rule was violated, the error was harmless beyond a reasonable doubt. *Chapman v. California*, 1967, 386 U.S. 18. We think not.

Although the alibi may seem incredible (the jury certainly did not believe it), and the victim positively identified the defendants in court, we cannot say that the admission of Runnels' statement did not harm O'Neil beyond a reasonable doubt. Some doubt was raised about the victim's identifications, and the alibi witnesses stuck by their stories. The remarkable agreement between Runnel's out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery. It seems to us more likely than not that Runnels' statement dispelled the doubts of the jury. *Harrington v. California*, 1969, 395 U.S. 250, does not persuade us that the error here was harmless. The state's case here was not overwhelming in the sense that the state's case was overwhelming in *Harrington*.

#### 4. *Exhaustion of state remedies.*

The warden argues that O'Neil has not exhausted his state remedies. The *Bruton* question was never presented to the state courts for the very good reason that *Bruton* had not been decided when O'Neil filed his federal petition. See *Ashley v. California*, 9 Cir., 1968, 397 F.2d 270; *United States ex rel. Walker v. Fogliani*, 9 Cir., 1965, 343 F.2d 43; *Blair v. California*, 9 Cir., 1965, 340 F.2d 741. See also *United States ex rel. Heirens v. Pate*, 7 Cir., 1967, 401 F.2d 147; *United States ex rel. DeLucia v. McMann*, 2 Cir., 1967, 373 F.2d 759; *United States ex rel. Martin v. McMann*, 2 Cir., 1965, 348 F.2d 896 (*in banc*). Cf. *United States ex rel. Bagley v. LaVallee*, 2 Cir., 1954, 332 F.2d 890.

On the other hand, the doctrine of exhaustion of state remedies, as codified in 28 U.S.C. § 2254, is based on comity, not jurisdiction. See *Bowen v. Johnston*, 1939, 306 U.S. 19, 27; *Hunt v. Warden*, 4 Cir., 1964, 335 F.2d 936, 940. Cf. *Wilson v. Anderson*, 9 Cir., 1967, 379 F.2d 330, *rev'd*, 330 U.S. 523 (1968). As we said in *Walker*, 343 F.2d at 47:

"There is no doubt as to whether or not the District Court had the power to entertain the petition for writ of habeas corpus. It had the power, a power which has been vested in the Federal District Courts since the Act of February 5, 1867 (c. 28, § 1, 14 Stat. 385-386) extended the Federal writ to state prisoners and perhaps before. *Townsend v. Sain*, 1963, 372 U.S. 293. . . . The question is one as to how the power should be appropriately exercised."

When O'Neil filed his federal petition he had exhausted his then state remedies. No evidentiary hearing was held; none was or is required. *Bruton* gave him a "new" ground. It is a state ground as well as a federal one, because the state courts are bound by decisions of the United States Supreme Court construing the Constitution of the United States. The "facts," i.e., the contents of the state record, are not disputed. The only question is one of law and federal law at that. The record shows that O'Neil did present the question, (but obviously could not cite *Bruton* or *Roberts v. Russell*, both *supra*) to the California courts. He relied on a decision of the California courts, *People v. Aranda*, 1965, 63 Cal.2d 518, which anticipated *Bruton*. The California Supreme Court has held, however, in *People v. Charles*, 1967, 66 Cal. 2d 330, that *People v. Aranda* was not retroactive, that it did not apply to decisions that were then final. This is contrary to the *Roberts* rule of the Supreme Court, as applied to *Bruton*. But the *People v. Charles* holding did not affect O'Neil, because the affirmance of his conviction occurred only five days before *People v. Charles* was decided. His conviction was not final; he could and did apply for a rehearing, which was denied. He then sought habeas corpus in the California Supreme Court, which was also denied. Thus substantially the same question that he now presents was presented to and decided by the California court, California having anticipated *Bruton*. We can find here no benefit to California's administration of justice, no amelioration of state-federal relationships, in requiring that O'Neil again wend his

way through California's courts. Federal law requires the decision that the District Judge made. Under the peculiar facts of this case, we agree with the District Judge that O'Neil has done enough so that he can be fairly said to have exhausted his state remedies. We here exercise our discretion to sustain that ruling.

We think that the matter is controlled by *Roberts v. LaVallee*, 1967, 389 U.S. 40, and by our decision in *Pope v. Harper*, 1969, 407 F.2d 1303. As we there pointed out, *Roberts v. LaVallee* has destroyed whatever support the warden might find in *Blair, supra*. In *Ashley and Walker, supra*, there was fact finding to be done, and we thought it appropriate that the state courts be given the opportunity to find the facts.

Affirmed.

Solomon, Dissenting:

We may be nearing the day when a co-defendant's confession in a joint trial will be barred, but I do not believe *Bruton v. United States*, 391 U.S. 123 (1968), or any other case cited by the majority goes that far.

Here, a police officer testified that after the arrest of Runnels, a co-defendant, Runnels confessed that on the day of the crimes O'Neil asked him if he wanted "to make a couple of hits." According to the officer, Runnels said that the two of them entered the victim's car and at gunpoint took the victim's money. They forced the victim to drive several blocks and get out of his car. They then drove away in the victim's car.

In his defense, Runnels took the stand and denied making the confession. He testified that he and O'Neil did not commit the crimes and that they were at O'Neil's house at the time. O'Neil also took the stand, and he too testified that they were at his house at the time of the crimes. Two other defense witnesses corroborated this testimony.

In *Bruton*, the Government introduced co-defendant Evans' confession, but Evans refused to testify. The Supreme Court set aside Bruton's conviction because Evans' refusal to take the stand "posed a substantial threat to [Bruton's] right to confront the witnesses against him" and denied Bruton a fair trial. 391 U.S. at 137.

According to the majority here, the State's introduction of Runnels' confession created a *Bruton* situation which was not cured by Runnels' subsequent testimony because Runnels refused to acknowledge the confession as his.

The majority believes that *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton* require a confession to be excluded whenever the co-defendant denies that he made it. In *Douglas*, the defendant was convicted, in a separate trial, of assault with intent to murder. At the trial, the prosecutor asked leading questions to tell the jury about a confession of Loyd, an accomplice. According to the confession, Douglas shot the victim. Loyd refused to testify.

The Supreme Court reversed Douglas' conviction because Douglas could not cross-examine Loyd "to test the truth of the statement itself," 380 U.S. at

420, and held that Douglas was unfairly prejudiced by his inability to cross-examine Loyd.

The Supreme Court also stated that "effective confrontation of Loyd was possible only if Loyd affirmed that statement as his." 380 U.S. at 420. Relying on this statement, the majority here holds that O'Neil's conviction must be reversed because Runnels did not affirm the confession as his.

I do not believe *Bruton* and *Douglas* require exclusion of the confession here. In each case, the co-defendant refused to testify, and he therefore could not be cross-examined. Here, Runnels testified and his testimony was subject to cross-examination. O'Neil elected not to cross-examine Runnels because Runnels supported O'Neil's alibi when he testified that O'Neil was with him at O'Neil's house at the time of the crimes.

The majority also cites *West v. Henderson*, 409 F.2d 95 (6th Cir. 1969), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), in support of its position.

In *West*, the defendant and two others were tried for first degree murder in Tennessee, where the jury fixes the punishment and has the power to impose a death sentence. The prosecutor introduced the statement of one of the co-defendants, who denied making the statement. According to the Sixth Circuit, this statement, which the prosecutor called a "confession," was "a studied effort on the part of [the co-defendant] to exculpate himself and to inculcate [the defendant]." 409 F.2d at 97. The Court held that intro-

duction of the confession was fundamentally unfair to the defendant and reversed his conviction.

In *Townsend*, Terry was placed in solitary confinement after an attempted prison break and was interrogated about the details of the incident. He confessed that he, Townsend, and two others planned the break and attempted to carry it out. At the joint trial of Terry and Townsend, the prosecutor introduced the confession. Terry denied that he confessed. The Sixth Circuit reversed Terry's conviction because it found that the State had pressured Terry into confessing by placing him in solitary confinement on a diet of bread and water and without medical treatment. The Court also reversed Townsend's conviction because Townsend could not cross-examine Terry on the details of the confession.

In *West*, the defendant's life depended on his being able to show that the co-defendant's story, which placed the primary blame on the defendant, was false and that the co-defendant wanted to shift the blame for the crime to the defendant. In *Townsend*, the defendant might have shown that the co-defendant implicated him because the co-defendant wanted to get out of solitary confinement.

Here, as in *West* and *Townsend*, O'Neil could not question Runnels on the details of the confession. But here, unlike *West* and *Townsend*, O'Neil did not want to question Runnels about the confession. O'Neil knew that the jury would not believe the alibi to which both he and Runnels testified unless Runnels could convince the jury that he did not confess. It was im-

portant for O'Neil that Runnels appear to be a witness worthy of belief. O'Neil was anxious to avoid doing anything which might damage Runnels' credibility.

If Runnels had acknowledged the confession, the testimony of the officer would have been admissible against Runnels. O'Neil could have cross-examined Runnels on the confession. *Rios-Ramirez v. United States*, 403 F.2d 1016 (9th Cir. 1968), cert. denied 394 U.S. 951 (1969); *Santoro v. United States*, 402 F.2d 920 (9th Cir. 1968).

If the State had not presented Runnels' confession as part of its case, and if Runnels had testified that he and O'Neil were at O'Neil's house at the time of the crimes, the State could have used the confession to impeach Runnels' testimony. Cf. *Lewis v. Yeager*, 411 F.2d 414 (3d Cir. 1969); *United States v. Ballentine*, 410 F.2d 375 (2d Cir. 1969).

In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes.

Unless we are willing to hold that use of a co-defendant's confession is impermissible when the co-defendant admits that he confessed and when the State uses the confession for impeachment, I do not see how we can decide that the use of the confession under the facts here by a state court was impermissi-

ble or that, if it was error, it was error of constitutional proportions. I do not believe *Bruton* requires that we go that far, and I believe that such a decision would be contrary to the recent decisions of this and other Courts of Appeals in *Rios-Ramirez*, *Santoro*, *Lewis*, and *Ballentine*.

I would reverse the decision below and hold that the use of Runnels' confession did not deprive O'Neil of a fair trial.

United States Court of Appeals  
for the Ninth Circuit

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No. 23,149

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Joe J.B. O'Neil,

Appellant,

vs.

Louis S. Nelson, Warden,

Appellee.

Before: Duniway and Browning, Circuit Judges,  
Solomon, District Judge

ORDER

Appellant's petition for a rehearing was received one day late. The Clerk is ordered to file the petition. The petition for a rehearing is denied. Judge Solomon would grant the petition.

The petition and suggestion for a rehearing in banc has been transmitted to all of the judges of the court who are in regular active service. No member of the court has voted to grant a rehearing in banc. The suggestion of a rehearing in banc is rejected.

Filed April 23, 1970,

Wm. B. Luck, Clerk.

**EXCERPTS FROM REPORTER'S TRANSCRIPT OF  
TRIAL IN THE CALIFORNIA SUPERIOR COURT**

**Testimony of Officer Russell M. Traphagen:**

*Direct Examination*

By Mr. Peven:

Q. Sir, would you tell us your occupation?

A. I'm a police officer for the City of Los Angeles, attached to University Detectives.

Q. And are you one of the investigating officers [91] in this case?

A. I am, sir.

Q. As such did you hold a conversation with Defendant Runnels?

A. I did, sir.

Q. When and where did this conversation take place?

A. That took place——

Mrs. Mills: May I take the officer on voir dire, your Honor?

Mr. Peven: For what purpose? I'm attempting to lay a foundation.

The Court: I think your motion is premature, Mrs. Mills.

Mrs. Mills: If the officer doesn't go into it right away, your Honor, I will wait until he has laid it.

By Mr. Peven:

Q. Proceed. When did you have this conversation?

A. That took place February 10th, 1965, at approximately 10:20 a.m. at the University Jail.

Q. Who was present during the course of this conversation?

A. The first conversation, myself and Defendant Runnels.

Q. Anybody else?

A. Not at that point. [92]

Q. All right. At the time you had this conversation with the Defendant Runnels, did you force him in any way to make a statement to you?

A. I did not.

Q. Did you threaten him or coerce him in any way?

A. I did not.

Q. Did you make any promises to him of immunity or no prosecution in order to induce a statement from him?

A. I did not.

Q. Before you had a conversation with him did you advise him that he had a right to an attorney?

A. I did, sir.

Q. Did you advise him that anything he did say to you might be used against him in a later criminal prosecution?

A. I did.

Q. Did you advise him that he didn't have to say anything to you?

A. I did.

Q. All right.

Would you relate the substance of that conversation?

Mr. Black: Just a moment, I object, and I desire to approach the bench with counsel and Mr. Peven.

The Court: Very well. [93]

(Whereupon, the following proceedings were had at the bench between Court and counsel, outside the hearing of the jury:)

Mrs. Mills: This is my objection also, your Honor.

Mr. Black: I am going to ask your Honor that certain parts of this conversation be stricken as it relates to the liquor store, and I think that was the part, wasn't it—the substance of the conversation, as I understand it, is that Defendant Runnels allegedly told this officer that quote, "After we robbed Mr. Collins, we then went to the liquor store in Culver City and was going to rob that," something to that effect.

Your Honor, I ask that the liquor store part of the conversation be stricken.

Mr. Peven: I would oppose that. I think it is part of the common plan, scheme, and design. It also relates to the circumstances of the defendants' arrest, particularly since the issue of probable cause for the defendants' arrest has been raised.

Mr. Black: I also desire your Honor to strike the part of the conversation as it relates to the Defendant O'Neil, in that Defendant O'Neil was not there at the time to either affirm or deny the statements which allegedly were made at this time.

The Court: Your first motion to strike is denied.

I will, however, instruct the jury that this [94] conversation will be received only as against Defendant Runnels.

Mr. Black: The second motion is in regard to Defendant O'Neil.

My second motion is that this conversation be stricken as to Defendant O'Neil.

The Court: Your motion to strike any part of the conversation is denied as far as being received in evidence.

The jury will be instructed that it will be received only as against Mr. Runnels.

Mr. Black: Might I add for the record, your Honor, that this was that part of the evidence which I was concerned about, and upon which I was basing my grounds for a separate trial, which has already been ruled upon.

Mrs. Mills: Your Honor, may I take the officer on voir dire?

The Court: Yes.

(Whereupon, the following proceedings were had in open court within the presence and hearing of the jury:)

*Voir Dire Examination*

By Mrs. Mills:

Q. Officer, do you know of your own knowledge when the men were arrested?

A. By me I do. [95]

Q. Oh, you were the arresting officer? You went up to Culver City?

A. I arrested them in Culver City and brought them back to our Department.

Q. What day was that then?

A. It was on the 9th of February, 1965, at 4:00 p.m.

Q. And you took him where?

A. To University Station.

Q. Do you know how long he was at University Station?

A. Oh, I believe we arraigned him on the 10th of February, 1965.

Q. Where was that? At the University——

A. He was arraigned in Division 40.

Q. That was on the——

A. I believe it was on the 10th of February.

Q. Were you at the arraignment?

A. I brought him down to the arraignment, yes. I didn't sit there while he was being arraigned.

Q. I didn't mean that. The 10th would be a Wednesday. Do you think it would be a Wednesday?

A. I can't recall, ma'am. I believe it was the following day after we arrested him; I believe we brought him down for arraignment.

The Court: Mrs. Mills, I think this is more properly [96] to be gone into on cross-examination.

Mrs. Mills: Well, your Honor——

By Mrs. Mills:

Q. Was your partner present at all when you talked to the——

A. The second time, yes. He repeated it to my partner.

Q. Did you allow him to make some phone calls?

A. We didn't deny him any. I don't know whether he made any or not.

I'm assuming he did, because his wife came in and saw me the morning after we had arrested him.

Q. It was just, if you know, how many calls he made.

Do you know?

A. I have no idea, ma'am.

Q. You would be the person who would allow him a phone call?

A. No, ma'am. He is allowed to make as many phone calls as he desires. There is a pay phone there, and if he has money to make them, he can make as many as he wishes.

Q. He is not limited to just two?

A. No, ma'am.

Q. I see.

Do police officers sometimes relay messages [97] to friends?

Mr. Peven: Well, your Honor, I will object as calling for a conclusion of this witness. It is also immaterial.

The Court: Objection sustained.

By Mrs. Mills:

Q. Did you talk to Mildred Manchester?

Mr. Peven: I object. This is improper voir dire.

The Court: Sustained.

Mrs. Mills: May we approach the bench, your Honor?

The Court: Very well.

(Whereupon, the following proceedings were had at the bench between Court and counsel, outside the hearing of the jury:)

Mrs. Mills: Your Honor, the purpose of a voir dire is to keep it out before it does any damage, of course, and it is my understanding that he relayed a message to Mildred Manchester, whom I think he called the defendant's wife, telling her that it was a very serious matter and to try to persuade the de-

fendant to plead guilty, and that if he would plead, he would see that he got five to ten years, but if he didn't—make a statement, rather; I said "plea"—if he didn't make a statement, it would be one to life.

I only want to know at this point if he did talk to her. [98]

Mr. Peven: I don't think that goes to the voluntariness of this defendant's statement.

Mrs. Mills: I think it does.

The Court: When was this conversation supposed to have taken place?

Mrs. Mills: Well, it was the morning of Wednesday the 10th. She——

The Court: Well, Mrs. Mills, that is the following day from the conversation. It has nothing to do with this conversation.

Mrs. Mills: No, it is the day of the conversation.

The Court: The conversation was on February 9th.

Mrs. Mills: No, he said it was the 10th.

The Court: I beg your pardon; it was February 10th he was arraigned.

Mrs. Mills: He phoned her and said he hadn't talked to the defendant yet, and asked her if she would talk to him and try to persuade him.

The Court: This was prior to the conversations?

Mrs. Mills: Yes.

Mr. Black: And also afterward, your Honor. I will join.

The Court: Very well, I will permit you.

(Whereupon, the following proceedings were had in open court within the presence and hearing of the jury:) [99]

The Court: May I have the date and time of the conversation again, please?

The Witness: That was on February 10th, 1965, at approximately 10:20 a.m.

The Court: Thank you.

*Voir Dire Examination (Continued.)*

By Mrs. Mills:

Q. Earlier that morning had you talked to Mildred Manchester, or on the previous date?

A. She was in at the station on the morning of the 10th.

Q. Did you ask her to persuade the Defendant Runnels to make a statement because it was such a serious charge?

A. No, ma'am.

Q. Did you tell her that if a statement were made that he would get a certain sentence, and that if these statements were not made, he would get a different—

A. I did not. As a matter of fact, she wasn't allowed to visit Mr. Runnels prior to his arraignment.

Q. Was she allowed to visit him if she got him to make a statement?

A. She was not.

Q. Was he arraigned after 10:20 a.m.?

A. I believe he was arraigned in the P.M. [100] arraignment.

Q. In other words, you took him from the University Station sometime after 10:20 a.m.?

A. I did.

Q. Down to the County——

A. That's correct.

Q. Did you tell her that if he did make some statement, that then she could see him and buy him some cigarettes?

A. I did not.

Q. Did you tell her that you had known him all his life, or words to that effect?

Mr. Peven: I object as being improper voir dire.

Mrs. Mills: It is preliminary, your Honor.

The Court: You may answer the question.

The Witness: I did not tell her I had known him all his life, no.

By Mrs. Mills:

Q. For a considerable portion of it?

A. Since he was about 12 years old; yes, ma'am.

Q. I see. Did you tell her that if he made a statement, you would see that he got from five to ten, and that if he didn't, he would get life?

A. I did not.

Q. Do you know whether she did see him at the University Jail? [101]

A. She did not, to my knowledge. I never gave her permission to see him, and she would have to get it through me.

Mrs. Mills: I see.

That is all on voir dire.

*Direct Examination (Continued.)*

By Mr. Peven:

Q. Would you relate the substance of the conversation you had with the Defendant Runnels?

The Court: Before you relate the conversation, I will instruct the jury that this statement is to be received and considered by the jury only as to the Defendant Runnels, the one who was making the statement, and is not to be considered by the jury in any manner as against his co-defendant, Defendant O'Neil.

By Mr. Peven:

Q. Go ahead.

A. I first stated to Mr. Runnels that his wife had told me that O'Neil was putting all the blame on him——

Mr. Black: Just a minute, your Honor, I'm going to move to strike this accusatory remark as not the conversation held by the Defendant Runnels.

The Court: Objection overruled.

The Witness: Defendant Runnels then stated the following: [102]

He stated that O'Neil had came to his place on the afternoon of the 9th.

He stated O'Neil asked him if he wanted to make a couple of hits.

He stated that he told O'Neil yes, he would.

He stated that they then went down to the Better Foods Market at the corner of Santa Barbara and Western Avenue.

He stated that O'Neil gave him \$16.

He stated they went inside the market.

I asked him if they had attempted to hold up the market.

He stated they had not.

He stated they then went outside to the parking lot of the market where they observed this man in a white Cadillac.

He stated that O'Neil had the gun; that O'Neil went up to the driver on the passenger side of the vehicle, ordered the man in the car to sit where he was; that he got in the back of the vehicle—referring to Runnels.

He stated that they made this man drive them over on St. Andrews Place to a certain location; that they then made the man get out of the vehicle after robbing him.

He stated that he then drove the vehicle, the Cadillac, and that they then went to Culver City. [103]

He stated that they had gotten out of the vehicle in Culver City and gone to this liquor store.

He stated they went into the liquor store. There were too many people in the liquor store—

Mrs. Mills: Objection, your Honor, as being prejudicial, and I object to what was said and ask that it be stricken.

The Court: Overruled.

The Witness: He stated that they then left the liquor store because there were too many people there.

They went back on down to the front of the liquor store. There were still too many people in there.

He stated that they then circled the block a few times, at which time the Culver City Police Department arrested them.

By Mr. Peven:

Q. Did you ask them why they went down to Culver City?

A. Well, I didn't ask him why——

Mrs. Mills: Objection, your Honor. Irrelevant and immaterial.

The Court: The objection is sustained.

By Mr. Peven:

Q. Did you ask him why they went into this liquor store?

A. I did. [104]

Mrs. Mills: I also object your Honor, as incompetent, immaterial and irrelevant.

The Court: Overruled.

By Mr. Peven:

Q. What did he say?

A. He stated they were going to rob it.

Q. Did you ask him why they were circling around the liquor store?

A. I did.

Q. What did he say?

A. He stated there were too many people in the liquor store at the time, and they were waiting for less customers and less people to be in the liquor store, and they were going to go back and rob it.

Q. Have you related the substance of the conversation you had with the Defendant Runnels?

A. I have, sir.

Mr. Peven: That is all I have.

Nothing further.

The Court: You stated, Officer, if I understood you correctly, that O'Neil had come to his place in the afternoon of the 9th.

It was my understanding that you arrested the defendants on the 9th at 4:00 o'clock.

The Witness: Sorry. It was the afternoon of the 8th. [105]

The Court: Thank you.

*Cross-Examination*

By Mrs. Mills:

Q. You're not positive about the dates then, the date that you took Mr. Runnels down to the Division 40? That could have been the next day, the 11th?

A. I'm not positive. I believe it was the same day I had the conversation with him.

I think it was the 10th, but I'm not positive about it.

Q. You're not positive of the day you took him to court, but are you positive of the day that the statement was made?

A. Yes, ma'am.

Q. Did you tell him that it would be better for him if he told you what happened?

A. I did not.

Q. Did you tell him that you would try to help him, or anything, if he made a statement?

A. I did not.

Q. Officer, was there any—did you have any opinion as to whether this man had been drinking?

Did he have a hangover, or anything?

A. Well, I don't know if he had a hangover or not. [106]

Q. I mean was there anything apparent that you noticed?

I know you didn't see him immediately, but you did arrest him on the 9th?

A. Yes, ma'am, in the afternoon.

No, there was no indication in my opinion that he had had—that he was having a hangover, or had a hangover.

Q. And he didn't appear to be drunk at that time?

A. No, ma'am.

Q. Officer, you said that somebody called Mr. Runnels' wife.

Is that Mildred Manchester?

A. Pardon? I didn't understand your question.

Q. Is it a Mildred Manchester that you referred to when you said that his wife, "had told me that O'Neil was putting all the blame on him"?

A. I'm referring to the young lady in the back of the court. I believe her name is Mildred Manchester now.

A Voice: That is my name, Mildred Manchester.

Mrs. Mills: Thank you.

By Mrs. Mills:

Q. Did you tell him this in order to persuade him to say anything? [107]

A. I don't believe so.

Q. This is something that she had actually told you that you were not pleased about relating?

A. Yes, ma'am. Pardon me?

Q. You were not confused about the lady. It's something that she told you; is that correct?

A. This young lady in the back of the court? Yes, ma'am.

Q. You said there was another conversation. Was this to the same effect?

A. It was.

Q. Was there any recording made of the conversation, or either of them?

A. There was not.

Q. Who was your partner present at the second one?

A. Sgt. E. W. McCain.

Q. Did he seem upset at the time, Mr. Traphagen?

A. I don't believe so.

Q. Was he mad at anybody?

A. He didn't appear to be.

Mrs. Mills: Well, that is all.

By Mrs. Mills:

Q. I may be repeating myself, but you know we go over these things so many times mentally that I don't intend to. [108]

Did you say that, as far as you know, this Mildred Manchester did not talk to the defendant before this statement?

A. Well, now, I don't know whether she talked to him on the phone or not, ma'am.

She didn't advise him in person.

Q. That's what I meant.

A. No, ma'am.

Q. Other people could give him the authority to use the phone, other than yourself; is that correct?

A. The jailer would give him—any time he wanted to use the phone, the jailer gives him his permission.

Q. I see. Then there is no limit on the phone calls as long as the jailer has the time and the man has the money; is that correct?

A. As far as I know, I believe it is the law.

Q. Well, I think—my understanding is a little different.

I wondered if you—

Mr. Peven: I will object to that as being argumentative.

The Court: Sustained.

Mrs. Mills: I didn't mean it that way.

I guess that is all I have. Thank you, Officer.

Mr. Black: I have no questions. [109]

Mr. Peven: I have nothing further.

The Court: You may step down. [110]

**Testimony of Defendant Roosevelt Runnels:**

*Direct Examination*

Mr. Runnels, do you remember the evening of February 8, 1965, this year?

A. Yes, I do.

Q. Where were you in the early part of the evening? [184]

A. The early part of the evening I was at home.

Q. Do you know what hour you went home and what time you left?

A. Well, I was home from—the morning of the 8th I got up about 10:00 o'clock, and I left about, I guess, about 3:30 in the afternoon of the 8th, and I went back to Defendant O'Neil's house.

Q. I didn't hear that last answer.

A. I went back to Defendant O'Neil's. I went over to his house that afternoon late, about 3:30 or 4:00.

Q. What time did you and Mr. O'Neil meet that day?

A. Between 3:30 and 4:00 over by his house.

Q. When did you go to your own home?

A. Oh, about 7:00, about 7:00 o'clock in the evening.

Q. And who was there that evening?

A. When I got home?

Q. Well, there was you and Mr. O'Neil—were you still together?

A. Yes, we left his house to go over to my house about 7:00 o'clock, and my mother was home when I got home that evening, that night at 8:00.

Q. Who else was there?

A. My mother.

Q. Were there some other people there later?

[185]

A. No, but I—not while I was there it wasn't. Just my mother was there when I arrived back at 7:30.

Q. Well, was your sister Lorie there?

A. No, I have no sister named Lorie.

Q. Oh, I—well, where did you and Mr. O'Neil go then when you went from your home? Where did you go?

A. We left my house together about, oh, about 8:20, going back over to his house, and we got back to his house about ten minutes till 9:00, or 9:00 o'clock, in between there. Takes about half an hour to go from my house to his house.

Q. So it was just about 9:00?

A. Yes.

Q. Who was at his house?

A. When we arrived back at his house, his sister was there, and his mother, a girlfriend of his—I forget her name—and a little boy, Loydean's little boy. I forget his name.

Q. Do you remember what you did that evening, or how long you were there?

A. We bought some beer and some Vodka on the way back to my house, and we came back and started doing some dancing.

Q. You didn't get drunk; is that right?

A. No, we didn't get drunk.

Q. Do you remember what time you left? [186]

A. It was about, I guess, about 11:00. I can't say exactly, because I didn't look at my watch until 11:15, and we'd been gone from his house when I looked at my watch.

Q. Did you go to the vicinity of the Top Cat?

A. Later on that night.

Q. What time?

A. It was about 12:00 o'clock when we got around to the Top Cat.

Q. What happened there?

A. Well, before this, before we went to the Top Cat, we went back to another young lady's house over on Pico and Western, and she wasn't home, so we went up to the bus stop on Pico and Western, waiting for a bus, and that's when we got this ride with this fellow.

Q. That's when you got what?

A. We got a ride. We were hitchhiking while we were waiting for the bus. We were hitchhiking, trying to get a ride.

Q. You got a ride at the bus stop?

A. Yes.

Q. With whom?

A. Gary.

Q. And what is Gary's last name?

A. I believe that's his last. I don't know his first name. [187]

Q. You don't know his first name?

A. No, I don't.

Q. Did you know him before?

A. I had seen him before.

Q. Was he a friend of yours?

A. Not a friend, no.

Q. Well, where did he take you?

A. He took us to the Top Cat.

Q. He drove you there, is that right, in his car?

A. Yes. I thought it was his car at that time.

Q. What kind of a car was it?

A. It was a '56 Cadillac.

Q. Was it white?

A. Yes, it's a car—the car that we were arrested in.

Q. All right. When you went to the Top Cat, did you go inside, or did he go inside?

A. No, this fellow Gary went inside, but O'Neil and I, we were waiting in the car.

Q. How long was he inside?

A. I'd say a matter of five or ten minutes. Ten minutes at the most.

Q. Well, when he came out, was there any conversation?

Don't give it to me, but was there any conversation between you and this Mr. Gary? [188]

A. Not between me and him, no.

Q. Mr. O'Neil and Mr. Gary?

A. Yes.

Q. After the conversation what happened, or what did you do?

A. Well, after the conversation took place between O'Neil and this other fellow, he gives J. B. the keys to the car. He gave O'Neil the keys to the car.

Q. He gave O'Neil the keys to the car, Gary did?

A. Yes, and O'Neil, he didn't even have any license to drive, but I did, so when he gave him the keys, he gave—O'Neil gave the keys to me after Gary had given them to him, and I got around and went to the driver's side, and got in, and we left for Santa Monica.

Q. And you started for Santa Monica?

A. Yes.

Q. Do you know what time it was that he passed the keys over to you?

A. Well, at this time it was about 12:15, I guess, or 12:25.

Q. What time did you meet him at the bus stop?

A. I guess it was about quarter to 11:00, quarter to 12:00 that night when he picked us up at the bus stop on Pico.

Q. And it was when you started for Santa Monica, that is when the police car drove up behind you, is that [189] right, as you passed through another town?

A. Yes.

Mr. Peven: Well, your Honor—withdraw it. By Mrs. Mills:

Q. What was the name of the other town, if you found out, or if you know?

A. At that time I didn't know, but I do now. It was Culver City.

Q. Had you been circling around the block?

A. No, we hadn't been circling around the block.

Q. While you were driving did Mr. O'Neil look in the glove compartment for anything?

A. He looked in the glove compartment. He asked me for a light. He wanted to smoke a cigarette, and at the time my lighter was out of lighter fluid, and I didn't have a lighter. I didn't have a light or a match, and he didn't have a match and looked in the glove compartment for a match, and he seen this gun in the glove compartment, and when we seen this gun in the glove compartment, we was on Washington, and we turned off Washington to go back home.

He said the gun—this gun—"There's a gun in the glove compartment," and I turned around to start back, to take this car back to the Top Cat where this fellow Gary—

Q. That was after you saw the gun you decided to [190] take back the car?

A. We didn't go to Santa Monica. We were coming back to L. A. We turned around, went through an alley to throw the gun out of the window, and J. B. threw it out of the window. The police came up behind us with their lights on, and they turned their lights on and siren, red lights and pulled us over.

Q. Did they tell you what you were being arrested for when they stopped the car?

A. No, they didn't.

Q. Did they put the handcuffs on you or tell you to put your hands in any particular place?

A. No, when we—they first—when we first—I got out of the car. I didn't know what the ticket was for, but I thought they had stopped us to give me a ticket, and I got out of the car myself at first, by myself, and when I got out they had a gun drawn, and they told me not to move and put my hands on top of the car, and they told O'Neil to get out on the other side and put his hands on the car, but they still hadn't told us what we was being arrested for.

Q. That's what you both did?

A. Yes.

Q. How long were you supposed to keep this Cadillac that belonged, as you thought, to Mr. Gary?

A. We were supposed to have brought it back that [191] morning, about 2:00 o'clock when this club closed, when the Top Cat Club closed, and if it was closed before we got back, we were supposed to park on 61st off of Vermont and put the keys on the front seat and leave the car, and this Gary would come back and get it sometime that night or the next day, or something.

Q. Did you ever see Mr. Collins before you saw him in the courtroom or at the lineup?

A. No.

Q. Had you committed this robbery?

A. No.

Q. Well, you heard testimony that you made a statement.

Now, did you make that statement?

A. No, I never made that statement to the fact that I commit a robbery.

Q. Did you make any statement at all?

A. No statement.

The Court: You're referring to the statement that was testified to by Officer Traphagen?

Mrs. Mills: Yes.

That's all.

Mr. Black: No questions, your Honor. [192]

*Cross Examination*

By Mr. Peven:

Q. Are you a friend of O'Neil?

A. I wouldn't say a friend. I know him.

Q. Well, did you buddy around with him?

A. For the past couple months.

Q. Well, before, I'm talking about. We are talking about a day in February. Were you a friend of his back in February?

A. I was with him on the—on the 8th of February.

Q. Well, I mean before that day now, had you been a friend of his?

A. Well, what would you call a friend?

Q. Well, did you go places with him?

A. No.

Q. Well, now, was this the first time you had ever been over to his house?

A. No.

Q. Well, then when was the first time you had been over to his house?

A. I think it was about the first part of December.

Q. All right. Had you known him before December?

A. Yes, I had. [193]

Q. When was the first time you met him?

A. It was '55, 1955.

Q. Well, that's about ten years. You had gone places with him, hadn't you?

A. No.

Q. When was the first time you had gone some place together?

A. The first part of December.

Q. I see.

A. From 1955 until the first of December, first part of December, 1964, I hadn't seen him.

Q. Do you have a car?

A. Yes. Well, now?

Q. We are talking about back in February.

A. Yes, I had one in February.

Q. What kind of car was that?

A. 1947 Pontiac.

Q. Did O'Neil have a car, as far as you know?

A. No, I don't think so.

Q. Now, you're telling us about in February 8th, you were over at O'Neil's house, and he went back to your house, and you went back to O'Neil's house, and you went back and forth a few times; right?

A. I wouldn't say a few times. I would say once.

Q. How did you go over to O'Neil's house the [194] first time?

A. Well, I had never been there before the 8th.

Q. No, I'm talking about on the 8th. You say you left your house and went over to O'Neil's house.

A. I said I had never been there before the 8th.

Q. How did you get from your house to O'Neil's house on the 8th?

A. I walked from my house to his house.

Q. Where did you live?

A. I live on 63rd and Broadway.

Q. What is the address there?

A. 335.

Q. 335 what?

A. West 63rd Place.

Q. And how far is that from O'Neil's place?

A. It's about a 25 or 30 minute walk, normal walking.

Q. Normal walking. You walked over there, you said?

A. Yes, I walked over there.

Q. When you got over there first, this was in the afternoon, was it?

A. Yes.

Q. And O'Neil was home, was he? [195]

A. Yes, he was.

Q. And did you go some place then with O'Neil?

A. Did I go some place with him?

Q. Right.

A. Not right away.

Q. Well, afterwards did you leave the house?

A. Yes, we left the house back and forth.

Q. Where did you go?

A. Went over to my house from his house. When I first went there, we went back to my house.

Q. But did you go together?

A. We walked.

Q. You and O'Neil walked together?

A. Yes, we walked.

Q. What would you go over to your house for?

A. I went to take my camera home. I had been taking some pictures that day.

Q. Then you stayed at your house for a while?

A. Till about 8:20.

Q. In the evening?

A. Yes, in the evening.

Q. Then where did you go?

A. We went back over to his house.

Q. Did you walk again?

A. Yes, we walked again.

Q. What did you go back to his house for? [196]

A. Well, at the time I was halfway going with his sister, starting to.

Q. Is that Loydean Mayfield?

A. Loydean, yes.

Q. All right. The girl who was up here testifying a little while ago, right?

A. Well, I consider her a young lady.

Q. Well, young lady.

A. Uh-huh.

Q. That is the young lady with the yellow sweater on in the courtroom?

A. Yes, correct.

Q. What did you go over there for anyway? You were about to tell us you went back to O'Neil's house.

A. Yeah. Well, we went back over there to dance and to drink some beer.

Q. Where did you get the beer?

A. We bought it on the way back over there from my house.

Q. Did you and O'Neil talk about committing some robberies there?

A. No, we didn't.

Q. Had you talked about committing any robberies over at your house?

A. No, we didn't.

Q. Did you ever talk about committing any [197] robberies that night?

A. Never talked about committing robberies at any time.

Q. Never talked about that with O'Neil, right?

A. Or anyone else.

Q. All right. Now, you say you left O'Neil's house sometime in the evening, right?

A. No, I didn't say sometime.

Q. About 11:00 o'clock, right?

A. Yes.

Q. It was after 11:00, you say?

A. I'd say it was about 11:00 or a little after, because the next time I looked at my watch it was 11:15, and we were gone from there for a while.

Q. Where were you going?

A. Over to a girlfriend of his.

Q. What is her name?

A. You have to talk to him. I don't know her name.

Q. Don't you know her name?

A. Yes, when I hear it.

Q. You don't know it now?

A. I don't know her.

Q. All right. Did you know her that night?

A. Did I know her that night? How am I going to know her that night when I don't know her now?

[198]

Q. Well, you were going there?

A. He asked me to go with him.

Q. Did he tell you why?

A. She was supposed to have a sister, and he wanted me to meet her sister.

Q. Where does she live?

A. On Pico, I believe.

Q. Pico and what?

A. Off Pico.

Q. Off Pico and what?

A. And Western. This is a house we went to.

Q. How were you getting down there from O'Neil's house?

A. We caught the bus.

Q. What bus did you catch?

A. The Western Bus.

Q. Where did you catch the bus?

A. On 54th and Western.

Q. Where is that from O'Neil's house?

A. About three blocks.

Q. About three blocks, and you went down there to Pico and Western, right?

A. Yes.

Q. And on the bus?

A. Yes.

Q. And you went over to this girl's house, did [199] you?

A. We did.

Q. And wasn't anybody home?

A. It wasn't.

Q. And then where were you going to go?

A. I was going home; I was going home.

Q. And where did you go then?

A. We went back to the bus stop on Pico and Western to wait for the bus.

Q. I see. And were you going to get in different buses then, or something?

A. No, the same bus, the bus up to Vermont. We don't get different buses.

Q. Then you saw this man drive by?

A. Yes.

Q. In the Cadillac?

A. Yes.

Q. Had you ever seen him before?

A. I had seen him, but I didn't know him.

Q. Well, what is his name?

A. Gary.

Q. Gary what?

A. I don't know his name.

Q. His last name, first name or last name?

A. I think it's his last name.

Q. How many times have you seen him before? [200]

A. I couldn't say how many. I shoot pool down at 54th and Hoover. I know him down there. Seen him there quite a bit.

Q. Do you know where he works?

A. No, I don't. That's the only place there I ever seen him until that night.

Q. Do you know where he lives?

A. Only at the pool hall, only place I had seen him.

Q. Had you talked to him before?

A. No, I haven't.

Q. You've never said a word to him?

A. We shot a couple of games of pool. I believe we had in the past.

Q. Did O'Neil look like he knew him?

A. O'Neil do know him.

Q. Was O'Neil talking to him?

A. In the car?

Q. Right.

A. Yeah, we was talking to him in the car.

Q. What did he do, just give you a ride?

A. He was going down Pico, and he saw O'Neil. I guess that's why he stopped.

Q. What did he say?

A. He asked if we wanted a ride.

Q. Did you tell him you wanted to go home? [201]

A. I told him where I was going, and O'Neil told him where he was going.

Q. What did he say?

A. He gave us a ride.

Q. Well, where was he going to take you?

A. He was going to the Top Cat Club on 61st and Vermont.

Q. What did you want to go over to the Top Cat for?

A. Who, me?

Q. Yes.

A. No, I live on 63rd. I was going to go back there. It's about five more blocks home, and on the way over there J. B. got talking to him about letting us use his car to go to Santa Monica.

Q. What does this man look like?

A. He looks something like O'Neil.

Q. Well, how tall is he?

A. I'd say about five-ten, five-eleven.

Q. Is he a colored man?

A. Yes, he is a Negro.

Q. And you have been out on bail, haven't you, on this case?

Mr. Black: Your Honor, I think this is immaterial.

The Court: Objection sustained. [202]

By Mr. Peven: . . .

Q. Have you tried to find this man?

Mr. Black: Again, your Honor, this is argumentive and immaterial.

Mr. Peven: I'm not arguing.

Mr. Black: It might be relevant, but I think it is immaterial. As a matter of fact, this has all been gone through before. I think it is getting repetitious.

Mr. Peven: I don't recall asking this question.

The Court: I will overrule the objection.

By Mr. Peven:

Q. Have you tried to find this man?

A. Why should I?

Q. Well, you say he gave you the car. Have you tried to find him?

A. No, I wouldn't know where to start to try to find him.

Q. Well, you had seen him before where?

A. At the pool hall on 54th.

Q. Have you gone back there?

A. I looked in back down there. I wouldn't say I was looking. I'd say I have been back, but I haven't been looking for him.

Q. Have you seen him——

A. No, I haven't.

Q. —since this date? [203]

A. No. Since the night of the 8th, no.

Q. You haven't seen him at all?

A. No.

Q. Now, you say you went down to the Top Cat at 61st and Vermont, right?

A. Yes.

Q. You got there about what time?

A. I guess it was about 12:00 o'clock, somewhere around 12:00.

Q. What did the man say?

A. When we got to the Top Cat?

Q. What happened when you got to the Top Cat?

A. He got out and went inside the club.

Q. What did he say?

A. He was supposed to meet somebody up there.

Q. Did he say who he was going to meet?

A. He said, but I can't remember the name.

Q. What did you do?

A. He told us to wait there.

Q. Why didn't you just get out and walk home?

A. Well, we was waiting to get this car from him, O'Neil was.

Q. Didn't you tell us you wanted to go home?

A. Sure, I was going home, because we didn't have any transportation when we decided to go home. We weren't going to ride a bus to Santa Monica. [204]

Q. I thought you said you wanted to go home from the Top Cat Club?

A. No, I said we wanted to go home if we caught the bus, but after we got the ride O'Neil asked him to leave us his car to go to Santa Monica.

Q. Well, you had changed your mind?

A. If we could get a car to ride out there, yes, I had.

Q. You wanted to go to Santa Monica for something?

A. Yes, I did.

Q. You decided you wasn't going to go home, right?

A. If we could get the car.

Q. Well, did you ask him if you could get the car?

A. I didn't ask him. I didn't know the fellow. O'Neil asked him.

Q. I see. When you got—he agreed to give you the car?

A. He didn't know till he got to the club.

Q. Well, you got down to the club and he said he was going to go in and see somebody?

A. Yes.

Q. Was he in there for a while?

A. Approximately five, ten minutes.

Q. Did he come back out? [205]

A. Yes.

Q. And he said you could use the car, right?

A. Yes.

Q. Then you drove; is that right?

A. After—yeah.

Q. Where were you driving to?

A. Santa Monica.

Q. Where were you going to go in Santa Monica?

A. Ecknoll Street. I don't know how to spell it.

Q. What is up there?

A. Well, it's these two young ladies I know. They are singers.

Q. Oh, you were going to go see young ladies?

A. Was I going to go? I was on my way.

Q. Well, that's why you went to Santa Monica, right?

A. Yeah.

Q. And is that right in the City of Santa Monica?

A. Right in the city?

Q. Is it in it?

A. You mean Downtown Santa Monica?

Q. In the City of Santa Monica?

A. When you speak of city, do you mean downtown?

Q. No, I'm not talking about downtown. It's not in Los Angeles, is it? [206]

A. No, in Santa Monica.

Q. Is it near the beach?

A. Well, I'd say it was 24, 25 blocks from the beach.

Q. And did you say you were going to bring the car back by 2:00 o'clock in the morning?

A. That's what time the club closed, 2:00.

Q. Was that the arrangement you made, that you were going to bring the car back by that time?

A. I didn't make the arrangement. O'Neil made the arrangement with this fellow.

Q. Did you hear O'Neil make the arrangement?

A. Yes, I did.

Q. What was the arrangement then?

A. We were supposed to have brought the car back by 2:00 o'clock.

Q. 2:00 o'clock.

A. And if we didn't, we was supposed to park it at 51st off Vermont and leave the keys under the front seat, and he would come get it later.

Q. Were you supposed to have been back at 2:00?

A. If we didn't, it would have been all right. We was supposed to park it on 61st.

Q. What time was it you left?

A. About 12:00, 12:15, 12:20, something around there, I guess. [207]

Q. You didn't think you were going to go from 61st and Vermont to Santa Monica and back by 2:00, did you?

A. Well, we wasn't going out there to stay.

Q. What were you going to go there for?

A. I was going to get some money.

Q. You were going to get some money?

A. Yes.

Q. Where were you going to get the money from?

A. Irene or Sarah.

Q. Who is Irene and Sarah?

A. The two young ladies that sing out there in Santa Monica.

Q. That's why you went out there, just to get money from them?

A. Well, I know them, and I could have gotten it.

Q. Did you need some money?

A. Yes, my car was broken and I needed some more money to have it fixed.

Q. Now, what were you doing in Culver City?

A. We didn't get all the way to Santa Monica. We had turned around in Culver City.

Q. How were you going there?

A. How were we going?

Q. Yes.

A. Well, we traveled out there. I was driving out there. [208]

Q. What streets?

A. We went down Vermont to Washington, and went out Washington.

Q. All the way out Washington?

A. That's correct.

Q. What were you doing driving around the alley behind a liquor store?

A. I turned around off Washington coming back to L.A. and I made a turn in the alley. I didn't go all the way down the street there. I went in the alley.

Q. Behind a liquor store?

A. Yes.

Q. What did you turn around there for?

A. To come back to L.A.

Q. Why did you decide to come back to L.A.?

A. O'Neil opened the glove compartment and seen the gun in the glove compartment.

Q. Why did you decide to come back just because you saw the gun?

A. Well, he didn't have no permit for a gun, and I didn't either, and when you get stopped for anything and they search the car, we would have to say we had the gun, which we didn't.

Q. What did you think you would get stopped for?

A. No telling what you get stopped for. You don't expect to get stopped, but you get stopped sometimes, [209] don't you?

Q. What did O'Neil throw the gun out for?

A. You would have to ask him that.

Q. Did he tell you that?

A. I didn't ask him.

Q. Did he say anything when he threw the gun out?

A. If he did, I can't remember it.

Q. Now, do you remember talking to Officer Trap-hagen?

A. Remember talking to him?

Q. Yes, about this case?

A. Ain't talked to him about no case, no.

Q. Didn't you ever talk to him about the case?

A. No, I didn't talk to him about the case.

Q. Did he talk to you about the case?

A. Yeah, he talked to me about it.

Q. Did he ask you some questions about your whereabouts that night?

A. Yes, he asked me.

Q. Did he ask you whether or not you had robbed this man Mr. Collins?

A. Yes, he asked me that.

Q. Did he ask you whether or not you had taken his car?

A. He asked me that. [210]

Q. Did he ask you what you were doing down in Culver City?

A. Yes.

Q. Didn't you tell him that you had met O'Neil earlier that night and talked about committing some robberies?

A. I didn't tell him anything. I told him I had no comment to make.

Q. Did you tell him that you went down to the Better Foods Market?

A. Well, after he told me whatever I said would be held against me, and I could wait to talk to a lawyer, I decided I would wait to talk to a lawyer, and I didn't make no statement.

Q. None whatsoever?

A. That's right.

Q. You know where the Better Foods Market is?

A. Sure, I know where it is. Which one are you referring to, though?

Q. Santa Barbara and Western.

A. Yes, I know where that one is located.

Q. Over near your place, or what?

A. It's near my—near Mildred Manchester's house.

Q. Well, is that where you had been staying?

- A. Some nights I had. [211]
- Q. Well, in February?
- A. Some on the nights in February I had.
- Q. Does she live at this place on West 63rd Street, or the place that you gave as your address?
- A. Some nights she stayed over at my house. 63rd Place is my house. She's 41st and Halldale. That's only about four blocks from the Better Foods Market you're referring to now.
- Q. So you're familiar with that?
- A. I'm familiar with that neighborhood.
- Q. Do you shop in there?
- A. Sometimes.
- Q. Did you go in there that night with O'Neil?
- A. No, I didn't.
- Q. Didn't O'Neil give you \$16?
- A. No, O'Neil gave me \$26.
- Q. When did he give you \$26?
- A. That evening when I went over to his house.
- Q. Why did he give you that?
- A. Because earlier he had burned a clutch out on my car, and he was paying some of it down to replace the clutch of my car.
- Q. Did you go in the market?
- A. In the Better Foods Market?
- Q. Yes.
- A. Not on the 8th I didn't. [212]
- Q. You didn't go in there on the 8th. Did you go in this liquor store in Culver City?
- A. No, I didn't.
- Q. Didn't you tell Officer Traphagen you went in the liquor store?

A. I told you I made no statement to Mr. Traphagen.

Q. You refused to talk to him?

A. That's right.

Q. Everything Officer Traphagen says you told him, **he** is either mistaken or lying?

A. One of the two he is doing.

Q. Did you examine the gun that you say was taken out of the glove compartment?

A. I didn't examine anything.

Q. Did you see O'Neil looking at it?

A. I was driving.

Q. Well, didn't you look at the gun?

A. I was driving.

Q. Well, you haven't answered my question. Did you look at the gun?

A. I glanced at it. I won't say I looked at it.

Q. Well, did O'Neil show it to you?

A. Can you read a book while you're driving a car? [213]

Q. Are you going to answer the question? Did O'Neil show you the gun?

A. No, he didn't show it to me. I glanced at it. He said, "There's a gun in the glove compartment," and I glanced at it.

Q. Did you know the gun was loaded?

A. No, I didn't know it was loaded.

Q. You didn't check the registration of the car while you had it, did you?

A. No, I didn't.

Mr. Peven: Nothing further.

Mrs. Mills: May I ask a couple of questions, your Honor.

The Court: Yes.

*Redirect Examination*

By Mrs. Mills:

Q. How much money did you have on you when you were arrested?

A. When I was arrested, I think I had \$28 and some change.

Q. I see. Did you have a mustache similar to the one you have now when you were arrested?

A. Yes, I did.

Q. Did you have this scar which is on the left side of your face? Was that—[214]

A. Yes, I have had this since I was three years old.

Q. I see. Is the scar on the side that faces the jury?

A. Well, it's mostly on the left side, but it's on the right side also.

Q. Will you just show it to the jury?

A. They can see it.

Q. What clothes were you wearing that night, do you remember?

A. I was wearing—

Q. The ones you had on when you were arrested?

A. I had on a pink shirt.

Q. Pardon?

A. A pink shirt and a pair of gray slacks, and a gray jacket.

Mrs. Mills: We rest, your Honor. [215]

**Preliminary Proceedings**

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Filed Aug. 31, 1966,  
J. T. Alley, Clerk.

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In the District Court of Appeal  
of the State of California  
Second Appellate District

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L. A. No. 301136

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The People of the State of California,	}
Plaintiff-Respondent,	
vs.	
Joe J. B. O'Neil, Roosevelt Runnels, Defendants-Appellants.	

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Appeal from the Superior Court  
of Los Angeles County  
Hon. Kathleen Parker, Judge Presiding

**REPORTER'S TRANSCRIPT**

**Appearances:**

For Plaintiff-Respondent: The State Attorney  
General, 600 State Building, Los Angeles 12,  
California.

For Defendants-Appellants: In Propria Persona.

Superior Court of the State of California  
for the County of Los Angeles

Department No. 116      Hon. Kathleen Parker, Judge  
No. 301136

The People of the State of  
California,

Plaintiff,

vs.

Joe J. B. O'Neil,  
Roosevelt Runnels,

Defendants.

REPORTER'S TRANSCRIPT  
ON APPEAL

May 13, 1965 — May 18, 1965

May 14, 1965 — May 19, 1965

May 17, 1965 — June 17, 1965

Appearances:

For the People: Evelle J. Younger, District Attorney. By: Charles L. Peven, Deputy District Attorney, 600 Hall of Justice, Los Angeles 12, California.

For the Defendant Joe J. B. O'Neil: Arthur S. Black, Esq., 9350 Wilshire Boulevard, Beverly Hills, California.

For the Defendant Roosevelt Runnels: Erling J. Hovden, Public Defender. By: Florence E. Mills, Deputy Public Defender, 402 Hall of Justice, Los Angeles 12, California.

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**EXHIBITS**

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Los Angeles, California, Thursday, May 13, 1965;  
3:00 P.M.

The Court: People against Joe J. B. O'Neil and Roosevelt Runnels.

Mr. Black: Yes, your Honor, ready for Defendant O'Neil.

Mrs. Mills: Ready for Defendant Runnels, your Honor.

Mr. Black: I have a motion to make first, upon certain——

Mrs. Mills: Excuse me. I don't think the District Attorney is present.

The Court: Let the record show the District Attorney is now present.

Proceed, counsel.

Mr. Black: Thank you, your Honor.

I have a motion for severance of cause, your Honor, and this is—I desire that Defendant O'Neil's case be separated from the co-defendant's case.

This is based upon evidence which was learned by me yesterday, and I feel, your Honor, that if it is true that certain statements were made by the co-defendant, or should the same come into evidence—allegedly made by the co-defendant—it would prejudice Defendant O'Neil, and so far as his defense and due process of law, your Honor, [3] I believe that the statements will deny him a fair trial, and with that I submit it, your Honor.

The Court: Well, why did you only learn of this yesterday, counsel?

Mr. Black: I was just informed of it yesterday, your Honor. It was not at an earlier date at all. I

just learned of it yesterday, so as far as my knowledge was there had been no statements by either party, and in light of the defense of Defendant O'Neil, that he was at a place elsewhere at the time of the alleged offense, in light of what may amount to certain statements by the defense admitting——

The Court: Did you make discovery motion, counsel, to see what statements were made by either defendant?

Mr. Black: Not as such; however, I did see the police report, your Honor, and these statements that I am alluding to, attributed to the co-defendant, were not in that report.

I just learned these statements today. That is, I just learned that there were statements existing yesterday, but I learned exactly what these statements were today speaking to the officer, and these statements are not in the police report itself.

The Court: Well, common statements are not to be set forth in a police report, counsel. You didn't make a discovery motion as to all statements made by either party? [4]

Mr. Black: No, there was no discovery motion, your Honor, and neither was there any continuance on my part in regard to this case.

I spoke with one of the prosecuting attorneys. He didn't know of any of the statements that were made by either one of the co-defendants, yet when I spoke to the other prosecuting attorney, he did know about a statement, and this was yesterday that I first learned of the statement.

Mr. Peven: The People will oppose the motion for severance.

The Court: The motion is denied.

Mr. Black: Thank you, your Honor.

(Proceedings on unrelated matters.)

The Court: People against Joe J. B. O'Neil and Roosevelt Runnels.

Mr. Black: Defendant O'Neil is ready, your Honor.

Mrs. Mills: Ready for Defendant Runnels, your Honor.

Mr. Peven: People are ready.

The Court: I think before we get started selecting the jury we will excuse all witnesses in this case until 10:00 o'clock tomorrow morning, because I am sure we won't get as far as taking evidence today.

All witnesses in this case are ordered to return tomorrow at 10:00-o'clock.

You may swear the prospective jurors. [5]

## Arguments of Counsel

## OPENING ARGUMENT

Mr. Peven: Your Honor, Mr. Black, Mrs. Mills, and ladies and gentlemen of the jury:

As you know, we have reached the end of the case. The evidence is all in. I think most of you are experienced jurors, and some of you are experienced criminal jurors, and you know that this stage of the case we have reached is known as final argument.

At this stage, myself representing the People, I get the chance to talk to you to give you more or less my impression of what the evidence shows. Then Mrs. Mills, and Mr. Black, they have the opportunity, and I'm sure they will take this opportunity, to talk to you after I have finished. It is their opportunity to give their impression of what the evidence shows; also, to rebut whatever I might have to say, and then, of course, because the defendants are presumed to be innocent until proven guilty beyond a reasonable doubt, the law gives me another opportunity to respond to what defense counsel had to say, Mrs. Mills and Mr. Black, and I will take this opportunity to respond to what they say for two reasons: first of all, because the law allows me to, and, secondly, because I like to talk, but I hope I don't talk too much to you at this point. [254]

Now, of course, what I say to you now, and what Mrs. Mills and Mr. Black say to you when they talk to you, is not to be considered by you as any evidence

in the case, because none of us were sworn, none of us. We are just the attorneys in the case. We never did any testifying in front of you. The only evidence you are to consider in this case is the evidence that came from the witnesses, both those called by the People and those called by the defense, and what I say, or what Mr. Black and Mrs. Mills say, is not to be considered by you as evidence, and if any of us start talking about what the law is in the case, again it is not to be taken by you as the law. The law that you're to consider is that which comes from the judge at the close of the case, when she gives you instructions after all of the argument is in. That is the law you are to follow.

However, briefly, when we get into the case a little bit, I think we have to discuss a little bit of the law as far as it relates to these particular charges.

As you know, the defendants are charged in the Information with four Counts: Count I charging Kidnapping, Count II the Robbery, Count III the Grand Theft of the Automobile, and Count IV is the violation of the Vehicle Code relating to the automobile, driving the automobile, and I think we briefly have to examine and see what it is that we have here, and at this stage I am [255] going to talk to you as far as the evidence shows what Mr. Collins had to say, and I'm not going to, at least at this point, attempt to tie in the defendants to it, because, first of all, we know what Mr. Collins said. We have to see whether these crimes have been committed by some person, and you have Mr. Collins' testimony that he was sitting in his

car in the parking lot at this market waiting for his wife while she was shopping, and two men forced their way into his car. One of them had a gun and forced him to let the other man in, and they got in and forced him to drive a particular distance, several blocks, and forced him out of his car and took his car away. This is briefly the evidence.

Now, somebody did this to Mr. Collins. Now, first of all, to take it a little out of order, we have a robbery here.

Well, what is a robbery? It is the taking of the personal property of another person by means of force or fear, taking away this person's property without his permission, without his consent, and by means of force or fear.

Well now, was Mr. Collins robbed? I don't think you can have any argument about this. I don't know whether Mr. Black or Mrs. Mills will argue about this. I doubt it, but it is clear that Mr. Collins was robbed. Somebody came into his automobile, took his property away, [256] took his money out of his wallet, and eventually took his automobile by means of force or fear.

Mr. Collins told you he was afraid, and there was this gun stuck in his face. I think it is clear that you have a robbery.

Now, if you find that there is a robbery that has been committed against Mr. Collins, you will have to find whether this is a First Degree or Second Degree Robbery, and again I think the evidence is clear, and I don't think there will be much argument about it.

A First Degree Robbery is that which is committed by—at the time of the robbery the perpetrator, the one that commits the robbery, is armed with a dangerous or deadly weapon, and that makes it a First Degree Robbery.

If there is no dangerous or deadly weapon involved, then it will become a Second Degree Robbery. In this case it is clear that the people, or at least one of the two men that robbed Mr. Collins, had a gun, and I don't think there is anybody going to argue about the fact that it is a dangerous or deadly weapon. We all know how guns can kill people. There I think you have a robbery, and it is a robbery of the First Degree committed against Mr. Collins.

Now, was Mr. Collins kidnaped? You have to look at what is kidnaping. Kidnaping, and I think the judge will give you the definition, but briefly, kidnaping [257] is the carrying away of a person against his will, taking him from one place to another against his will.

Now, in this case it is charged that this kidnaping was kidnaping for the purpose of robbery, and I don't think we are going to have much argument in this case as to whether or not this was a kidnaping for the purpose of robbery, because again you have had two men forcing their way into the car, taking Mr. Collins, or forcing him against his will—he said he was in fear there because of the gun—forcing him to go a certain distance, in this case several blocks, certainly against his will.

While he is there and while he is on the way they take his money out of his wallet, and eventually they

take the car. We don't have any machines to put on the heads of people that do certain things to find out exactly what their intent was, but I think all the circumstances here in the world would dictate this was certainly a kidnaping for the purpose of robbery. What other reason would these people have to for going in this man's car and doing what they did? So you have a robbery and a kidnaping for the purpose of robbery.

Now, briefly as to the other two Counts, you have got a Grand Theft alleged as to the automobile, and briefly the law as to that is, as to what does it mean a Grand Theft Auto, this is the taking of an automobile of another without his consent, without his permission, [258] and with the intent to permanently deprive the owner or the person of his automobile. If you have that, you have those facts, then you have a Grand Theft of an automobile. This would be Count III.

This other section, this Count IV section, the violation of Section 10851 of the Vehicle Code, briefly it is known casually as a Joyriding Section. This is again the taking of an automobile of another person without his permission and without his consent, with the intent of taking it to either permanently or temporarily depriving the owner of his title to or possession of the automobile.

So, now in Count III you had the intent to permanently deprive. That is the Grand Theft Auto, and in Count IV you had the intent to either, one, permanently or, two, temporarily deprive the owner of his automobile.

I will talk about those two briefly a little bit later, but I think it is clear we know it is either one of these two Sections, because Mr. Collins—again the two men forced their way into his car, forced him out of the car at some point a few blocks from where he started, and took his automobile.

Now, they took it certainly without his permission and without his consent, and he was certainly deprived of that automobile at least for some period of time, so we know it is either Grand Theft or this Joyriding [259] Section that somebody committed against Mr. Collins.

After going through all this, I think it is clear that these crimes have been committed against Mr. Collins, and it is obvious that you know the only question in the case is who did it. It is the classic thing that we hear in mystery books, the whodunit. Who did this to Mr. Collins. You heard the evidence, and there's no sense in me standing up here and haranguing you about this especially. Mr. Collins says these two defendants did it, and he identifies Mr. Runnels and Mr. O'Neil.

You heard Mr. Collins testify. You heard all this cross examination of Mr. Collins. You heard how come he says that these two defendants did this. He tells you about how he saw them, how long he saw them, what they did, what they said, and what happened to him.

He tells you that in his mind he is sure that these are the men. Now, he also tells you as far as the gun that we have seen here in this case, that this looks like the gun. He can't say exactly. He didn't examine

the gun. You don't examine a gun when it's pointed at you and somebody is barking out orders to you and taking your money, threatening you in certain ways. You don't look for the serial number, but he says it looks like the gun. That is what Mr. Collins says.

The defendants, of course, they deny it. [200] You have heard the testimony from the defendants, and you have heard their witnesses.

Now, in addition to this, Mr. Collins telling you about this, we have the defendants arrested just a couple of hours, two or three hours, later.

Mr. Collins says it happened around 10:00 or 10:20 in the evening, and around 1:00 o'clock in the morning these defendants were arrested in Culver City, and lo and behold, they were driving in Mr. Collins' automobile after circling a liquor store, being seen coming from behind an alley of the liquor store, and after being stopped they are in the automobile, Mr. Collins' automobile.

Sure enough, there is Mr. Runnels. He is sitting there. He is driving the car, and Mr. O'Neil, he is the passenger in the car, and coincidentally, it's certainly very much of a coincidence, but this is exactly the order that when Mr. Collins leaves his car, it just so happened he says Mr. Runnels drove off. He was the driver, and Mr. O'Neil was the passenger, and here we are, by coincidence, a couple of hours later in Culver City, here they are in the same position in Mr. Collins' automobile.

You also have the gun. Mr. Collins says it looks like the same gun. Here is the gun thrown out of the car by Defendant O'Neil. He tells you when he saw

it in the car he was shocked. You heard his testimony, Mr. O'Neil's. I don't know how many times he used the [261] words, "Oh, I was shocked when I found out about this car and I saw this gun here," and did this and that. "I was just shocked to see all these things."

He was shocked so much, so uneasy and so shocked that he happened to throw the gun out, and lo and behold, this turns out to be the gun that looks like, according to Collins, that O'Neil had when he was robbed. O'Neil, no question about it, says he had the gun and says he threw it out.

Now, we have this to corroborate Mr. Collins' testimony, so you have these arguments. You get these cases where people say so and so did something to me, points out a man, you have an identification, and you are always going to have an attack on the man's identification. Either he was mistaken or he couldn't have seen what he did, and you're also going to have the defense attorneys—I'm sure you are going to have in this case Mrs. Mills and Mr. Black tell you how Mr. Collins is wrong and mistaken, and you are also going to have these attacks on the identification, and a lot of times in these cases you will have a defense counsel start screaming, "What is there to corroborate the identification? What is there?"

Is there any other evidence that we can point to to corroborate that this man is telling the truth when he identifies the defendants, and I think you have it in the case like this, where the defendants are arrested [262] in the man's car just a short time afterwards, and the defendant, at least O'Neil, is seen to

throw out the gun that the man says looks like the gun that O'Neil had. So I think you have a little bit of corroboration here. What other corroboration do you have to show that Mr. Collins maybe is telling you the truth, and maybe he is not as mistaken as defense counsel, or these defendants would have you believe?

Well, this man here, Runnels, he confesses. He tells Officer Traphagen, "I did it," and, "We did this thing," and he tells you, you heard the statement, and I'm not going to reiterate it, he tells you about what he and O'Neil did.

Now, the judge will admonish you, and I will tell you, you are not to consider this statement. O'Neil didn't make this statement. O'Neil made no confession in any way. O'Neil denied it, and the statement of Runnels is not to be used by you as any evidence against Mr. O'Neil. The judge will give you that, but here, Mr. Runnels, he denies making the statement. He denies making it, but the officer gets up and says Runnels confessed to the crime, and he goes down the line and tells you what Runnels had said, and Runnels pretty well corroborates everything that Mr. Collins had said. "We forced our way into the car, took the car, went down to Culver City where we were going to try to pull another robbery. We circled around this [263] liquor store, went in at one time and felt that too many people were in there, went out, were circling around waiting for it to empty out a little bit to rob it," and so forth.

I think when you get Mr. Runnels' confessing the crime, you have got a little more corroboration of

Mr. Collins to show maybe he is really telling the truth now.

What do we have against Mr. Runnels now? He denies it. "I didn't make that statement."

Now, I think before I go on a little further, I think there is one interesting aspect of this as far as this particular evidence about the confession is concerned, as far as defense testimony and evidence is concerned. I think that when you have some of this testimony, when you offer evidence, maybe I'm old-fashioned, but if you offer some evidence, I think it should be done to prove a particular point. You have got to have some objective you are going to prove. You put a witness on the stand. He should say something that you think is relevant or material to the issues, whether you're a prosecutor or whether you're a defense attorney. If you are going to put a witness on the stand as a defense witness, you should say something that it going to prove your defense, or to show that the prosecution is wrong.

Now, here Mrs. Mills calls up this [264] Mrs. Manchester. Who is Mrs. Manchester? The common-law wife of this defendant. She gets up on the stand. I don't know to what purpose she testified. I assume that the purpose of her testimony, when she tells you all about her meetings with Officer Traphagen, the man that related the confession of Mr. Runnels, and I assume that her testimony was to the effect that Traphagen was trying to induce her in some way to get Runnels, in some way to influence Runnels to make a statement. This was the total effect of her

testimony as I saw it, to try to get him to make a statement.

There was something about if he doesn't make a statement, he will get this amount of time, and if he does make a statement, "I will see to it that he gets this." More or less threats. She blurted out the words, "It seemed like he was trying to bribe me," and then Mrs. Mills had Mrs. Manchester tell you about how she called up the defendant and told him about these, if you want to call them, threats of the officer, and I assumed all the time this was to show they were trying to influence this statement from Runnels, and I fully expected then to hear something about Runnels saying that, "Yes, I made the statement, but I was coerced into it. I was influenced into it because of what the officer said," and then we would hear an argument about, well, the statement was made, yes; he confessed, but it wasn't free and voluntary, because [265] he had a promise, or he was influenced in some way to make the statement, and the judge will instruct you that if you feel the statement was not made freely and voluntarily that you can disregard the statement completely.

If you hear a statement by an officer that relates to a statement, confession, or admission of a defendant, you have got to figure out, determine first whether or not the statement was in fact made, and also you have got to figure out and determine whether or not it was made freely and voluntarily, and I thought this was the sole effect of what Mrs. Mills was attempting to prove here, because she took quite

a bit of time with Mrs. Manchester. There were quite a few questions on direct and cross examination, and yet the defendant gets on the stand and says, "I didn't make any statement." So why did we waste all this time about this Mrs. Manchester? What did she have to say? It means nothing.

I think this was something that was put on by Mrs. Mills or somebody just to waste time and to attempt to confuse you——

Mrs. Mills: I object to the District Attorney making the remarks that I was trying to waste time, and that I was——

The Court: I think the objection is well taken, Mr. Peven.

Mr. Peven: All right. [266]

I don't know what the attempt was, then, at this point, but I think it was, at least in my mind, confusing. I can't see any reason why the woman was called. I don't see any reason for her testimony whatsoever, and I think we just did waste a lot of time by her testimony.

Now, another thing I think we have got to look at here, if we are going to talk about this confession, why should this officer lie? For what purpose is he going to go and stand up here on the stand and tell you that Mr. Runnels made a full confession to these charges? Why should he make it up? Is there any reason? Has there been any reason any way shown by these defense attorneys to show that this was made up? I can't see any. If he was going to bother making up a confession, making up statements, why does he just pick on on Runnels? Why doesn't he make up a

statement about O'Neil? That would make the case a lot better. It would be a lot easier to say, "Well, they both confessed to the crime. The defendants told me so and so," if you're just going to get up and lie, but he didn't do that. He told you that Runnels said so and so and made a confession. He said this. I don't know why this officer would get up there and lie to you.

Now, this briefly, of course, is what you find here as the People's case. I think another little bit of confusion—I don't know for what purpose a lot of these questions were asked, but I think it served to [267] confuse or muddy over the issues here a little bit, and I will mention it in passing; it is about the gun.

Do you remember about the questions of Mr. Black of the Culver City Police Department about the gun? The officer says he saw the gun thrown out the window, and he looks at People's 1. You have seen the gun, and he says, "Yes, this is the gun that I picked up," and Mr. Black asks him all kinds of questions, "How do you know it was the same gun? Did you look at the serial number? Did you put the gun in the evidence locker and get it out?" This and that, and I don't know for what purpose. Was it an attempt to show the officer was mistaken, that it wasn't the gun? I don't know.

Then the defendant, of course, he takes the stand and says, "Yes, I threw out the gun. I threw it out on the lawn. Threw it out."

Now, if we have that, what is the purpose of asking all these questions and going through all this time about the officer, about the gun? Was he trying to

show it was not the gun, the man didn't throw out the gun? Then the man says, "Yes, he threw out the gun."

So again I think you get something in the case that is just time consuming and confusing, muddying up the issues when you have clear issues in the case.

You have only one issue here, or a couple of issues. You don't bother about other things that are clear [268] and uncontroverted.

Now, I think, of course, that the basis of the evidence—you have heard it—the People have proven their case beyond a reasonable doubt, based on the identification of Mr. Collins, based on the fact that the defendants have the car, of the gun, based on the confession of Mr. Runnels.

Now, the defendants deny it. They have this alibi, and I will admit to you this is ironclad if you are going to believe it, if you're going to believe all these people, the two defendants, and you are going to believe the defense witnesses, the man's common-law wife, the man's sister, Mr. O'Neil's sister, Mr. O'Neil's mother; if you're going to believe them, then it would look like, "Oh, well, they were in that house, and it was after 11:00, and they could remember that day exactly. They could remember the time. It looks like they weren't there. They weren't in on this robbery. They didn't do anything."

Now, you heard the evidence. You heard the witnesses testify. You heard their demeanor. I think it is interesting to point out that, when talking about identification, Mr. Collins isn't just identifying one person here; Mr. Collins is identifying two people,

and if he is going to be mistaken, he has got to be mistaken twice. He can't be mistaken as to one and not the other, because it would be impossible in a case like this, because [269] the defendants put themselves together all that evening. They say they were together, and if you're going to disbelieve Mr. Collins, to think Mr. Collins is either lying or Mr. Collins is very badly mistaken, you have got to think that he is badly mistaken as to both defendants, or he is lying as to both of these defendants, because they say they were together, and everybody says they were together, and so I think it is interesting, because when you talk about identification, he is not just pointing out the features or saying that about one person—true, somebody can be mistaken. You had these questions asked of you when you were chosen as jurors, "Have you ever been mistaken for somebody else?" People make mistakes. There is wrong identification, and I'm sure these people are going to argue it about how this man is wrong, the identification is wrong, but it might be as to one person, you can understand that, but it is pretty hard to be wrong now as to two of them. They say they were together. I think you are going to have to start really figuring, if you are going to believe that Mr. Collins is wrong or lying here, if you feel he is lying, then of course you are going to take these defendants and walk them right out that door, if you think Mr. Collins got up here under oath and lied to you.

Now, in addition there are a couple minor points in the case, and you are going to have to determine

[270] these in your verdicts, if you feel the defendants are guilty of these charges, you are going to have to find whether they were armed at the time of the commission of the offense. There is going to be a special verdict given to you for them to that effect. I don't think there is any question about it, if you reach the stage where you are going to be in discussion on this type of verdict, you are going to have to decide that they were guilty beyond a reasonable doubt, so there is no question, I don't think, at the time of the commission of the offense that they were armed, armed with this revolver.

As to one other verdict form in the case, you have Mr. O'Neil charged on each one of these particular Counts, that at the time of his arrest he was armed with a deadly weapon, and to wit a revolver. I suppose you can stand up here, or I could, and technically say, "Well, he was armed at the time of his arrest." See, he was arrested there in Culver City by these officers that saw him coming from around the liquor store, and right before the time of his arrest, just a little before, I don't know——

Mr. Black: Object to this argument, your Honor.

Mr. Peven: I don't know whether——

The Court: I didn't hear.

Mr. Black: For the record, object to this line of argument, your Honor.

The Court: Proceed, Mr. Peven. [271]

Mr. Peven: I don't know exactly how long the officer said it was from the time he saw the gun thrown out until the time he actually made the ar-

rest, the physical arrest of the defendants. I suppose technically you could say that, yes, Mr. O'Neil was armed at the time of his arrest. You could say this is a technicality. However, I don't think the evidence, to be frank about it, honest about it, I don't think the evidence does show that Mr. O'Neil at the time of his arrest, which, practically speaking, or to be exact about it, he was arrested when the car was stopped, and he was brought out of the car and placed under arrest. Technically at that point he did not have the gun in his possession, because he had already thrown it out of the window, so I don't think you can really say, under the state of the evidence that we have before us, that he was armed at the time of his arrest, and you will have verdict forms to that effect, and I just don't believe that the People have proven their case at that point, that Mr. O'Neil at the exact time of his arrest, as alleged in this Information, that he was armed with a revolver.

Now, getting back just briefly—and I will sit down in a minute—as to whether or not you have this joy-riding or this Grand Theft of the automobile, because I believe the evidence proves beyond a reasonable doubt that these defendants were the people that had done [272] these things to Mr. Collins, so for the sake of this argument I am not assuming this, that what is it? Is it a Grand Theft Auto, or is it a Joyriding?—because I feel that the evidence shows that they did take his car. These were the people that took the car.

Now, as I said, the Grand Theft Auto, and you have got to show the intent to permanently deprive

somebody of their possession or title to their car, and the Joyriding, all you have got to show is either an attempt to permanently or temporarily deprive them.

Now, as the evidence showed in this case, we know the car was taken from the man about 10:30, and they were arrested in the car about 1:00 o'clock, driving the car. Nothing had changed as far as the car, nothing was missing from the car. Apparently the car was in the same shape or general condition that it was in at the time it was taken when Mr. Collins went back the next day to the impound lot in Culver City and recovered his car.

Now, I don't know what the defendants would have done with the car had they not been arrested in the car, had they been lucky enough to maybe accomplish what Mr. Rummels said they were trying to do, pull another robbery in Culver City from that particular liquor store——

Mr. Black: Again, your Honor, I object for the record on this speculation on the part of the prosecution. It is no part of the evidence, your Honor. In fact, it is [273] prejudicial, and is no part——

Mrs. Mills: May it come in for probable cause only, your Honor.

The Court: Objection sustained.

Mrs. Mills: May the jury be instructed to disregard that?

Mr. Black: I think it is prejudicial, and I move for a mistrial.

The Court: Motion for mistrial is denied. The jury is admonished to disregard the remarks of counsel with respect to the liquor store.

Mr. Peven: Like I say, I don't know what the defendants would have done with the car had they not been arrested——

Mr. Black: Again, your Honor, the very same argument. I object.

The Court: Objection overruled.

Mr. Peven: Because it is clear they were arrested in the car.

Now, usually in these cases of Grand Theft from the automobile you can point to something to show that somebody intends to permanently deprive somebody else of his car. You can usually show the changing of license plates, maybe the filing off of a serial number or motor number, or something like that, the vehicle identification number, to try to conceal that, the [274] repainting of the car, or the changing of something on the car. Usually you can point to something like that, and if you have that, you can look at it and you say, "Yes, the man took the car, and he made these changes to the car and it seems to show that he had the intent to permanently deprive the other man of his car," but if you don't have anything like that, and you don't have it in a case like this, we have no changing of anything; the car is in the same condition, and it would appear that the state of the evidence would show that these defendants were intending to just temporarily use the car for some purposes that they had in mind, and not to permanently deprive Mr. Collins of his automobile.

Like I say, what they would have done, I don't know. Now, if you have this, and you have what I believe the evidence shows, an intent to temporarily

deprive him, then you have just this Count IV, the violation of Section 10851, and you would not have a Grand Theft Automobile.

Now, this is what I believe that the evidence shows in the case. I ask you to consider what Mrs. Mills has to say and what Mr. Black has to say, and I believe that the evidence shows that the defendants have been proven guilty beyond a reasonable doubt. Possibly not beyond any possible doubt. There is a possible doubt, I submit to you, but the judge is going to instruct you that [275] the evidence must be proven beyond a reasonable doubt, and I submit to you to examine the evidence on behalf of the People, and to examine the defense testimony, particularly the testimony of the two defendants, and see is their testimony, their story of what they did on this particular night, how they got that car, where they want, what they were doing, is this reasonable? Is their testimony reasonable, and judge that against the People's testimony, and I submit that the People have proven their case.

Thank you.

The Court: I dislike interrupting counsel in the middle of argument, so I think that at this time we will continue this matter over to 2:00 o'clock for the balance of the argument.

Once more I remind you of the admonishment of the Court regarding discussing the case and regarding forming any opinion thereon.

We will recess until 2:00.

(Whereupon, the proceedings in the above-entitled matter were recessed until 2:00 o'clock p.m. of the same day, Tuesday, May 18, 1965. [276])

Los Angeles, California, Tuesday, May 18, 1965;  
2:25 P.M.

The Court: People against Joe J. B. O'Neil and  
Roosevelt Runnels.

Mrs. Mills: Ready for Mr. Runnels.

Mr. Pevin: People are ready, your Honor.

Mr. Black: Ready for Defendant O'Neil, your  
Honor.

The Court: Is it stipulated, counsel, that the jury  
is all present?

Mr. Black: So stipulate, your Honor.

Mrs. Mills: Stipulate.

Mr. Peven: People stipulate.

The Court: You may proceed. [277]

### ARGUMENT

Mrs. Mills: Your Honor, counsel, and ladies and  
gentlemen:

As Mr. Peven has told you it is now our turn to  
tell you just a little resume of the case from the de-  
fendants' point of view. I don't have a very good  
memory, and I apologize for bringing all this stuff  
with me.

Mr. Peven said that of course Mr. Collins identified  
these two men, and I am sure none of you think, any  
more than I do, that Mr. Collins intentionally put the  
blame on these two men. I think he is a very nice  
man. I'm sure you all agree with me.

I do think, though, that even good, kind people can  
be mistaken, and there have been cases even where  
seven eyewitnesses to a robbery could make a mis-  
take.

There is one case that is well known in the law, that the two defendants—one's name was Ferguson; the other was, I think, Cinchinelli, but it is an odd name—they were found guilty of robbery on the eye-witness account of seven people who identified them as being the robbers, and they went to the State Prison. They were found guilty, and the District Attorney, or the Attorney General, I don't know which found it out first, began to [278] have some suspicions that they had the wrong men, and the Attorney General made an independent investigation, because their job isn't to convict, it is to convict only if the man is guilty, and they found out that these men were not guilty, and they were released, and the other men that they thought had done it were picked up.

Mr. Peven's position is to prove, by the evidence he has, beyond a reasonable doubt to you, just by presenting the facts, but the defendant doesn't have to prove anything. I do present to you facts that the defendants tell me about, and I present the facts. You are the people who are to decide how the facts impress you and which way you go on it, and the defendant does not have to prove he is innocent. He just has to prove, or give some evidence on which you can base the fact that maybe there is a reasonable doubt.

I told you about the one case, and then there was another case where two women positively identified a man who was seated at the next table to them in a cafe, and they had been in a bank that was robbed, the cashiers, I believe. It turned out that this man was a District Attorney, and he had been in court on

that date, so that was another eyewitness account, and that was one that was in Ventura County, and the Deputy District Attorney's name was Paul McKassel. Of course he was cleared very quickly, because he was known to be on the job at a certain time. [279]

Then there was another man who had been positively identified as selling a quantity of marijuana, and his name was Mr. Moore, and they submitted proof that at the time he was supposed to have been selling marijuana on an eyewitness account he had been in State Prison. Of course that is not a pleasant place to be, but he certainly couldn't be in two places at once.

Then it just happened to come out around the early part of April, it was a Mr. McGill had been charged and found guilty, and then somebody else was picked up, and it came out that it was he. It was just in the newspaper and so I'm asking you to just bear in mind that, although Mr. Collins was a fine man, I think he is a good-hearted man, that is not the point. It is whether you think that he was seeing correctly and did see these two men. He said that the man who got in on the left hesitated quite a while. He could see him out of his eye, I think it was, out of the corner of his eye. He said he stood there quite a while, as though unwilling, and he also said that it was so long it was really noticeable, but he wasn't looking directly at that man; he was just looking out of the corner of his eye, and he said that the man had on a black—I think he said he had on black trousers and a black coat, and that he had no scar, and that he had no mustache.

Now, a man was picked up wearing gray clothing [280] with a mustache, and a scar which certainly cannot be removed; it couldn't be anything else but the same scar he has had all his life.

As to the size, he was not certain about the size, or he could have possibly made a mistake, but he was mistaken as to whether he had on a mustache and had a scar.

Also, he said that he was told to look straight ahead, which he did because he was afraid, and when he got out of the car, he was still ordered to look straight ahead, and then he was told to walk towards the back end of the car by the fender, and then to keep looking straight ahead and walk across the street, which he did.

It wasn't until that time that the car drove away. I presume all that time he was doing as he was instructed, and just out of the corner of his eye he gave a quick glance, maybe, and that is not a good look, at the man that had got in the driver's seat.

They say when you have maybe a weak case, you sometimes attack the attorney. Well, I was supposed to have put Mildred Manchester on to prove something or other, and that I was taking extra time.

Well, as I said, I'm not here to prove anything but just to present the facts, and as I have two cases a day, this week anyway, and all of next week, I [281] assure you I am not delaying anything, and Mildred Manchester—they called her the wife, and she was honest enough to tell us she was just living with the man, she was not actually his wife—that she had gone down to the jail to try to see him when he was at the

University Station; that she didn't get to see him the evening of the 9th. That was the first time she knew that he was in jail at all. Of course she was concerned about it, to find out what it was about and take him money and cigarettes.

The officer said he had known this man most of his life, and told her that she couldn't see him that day, but to come back, and she went back on the 10th. For some reason she didn't see him that day, and the officer said to come back later, which she said she did, and that she went back on the 11th—that is the date I wanted you to remember—that she went back on the 11th to see him. She still didn't see him, but the officer, when she talked to him, she tells us that the officer said when she asked him, "Has he made a statement?" the officer said no, and the officer said from the witness stand that he had made the statement on the 10th of the month. This was the 11th. He tells her that he has not.

We do have the booking slip——

Mr. Pevin: Well, your Honor, I'm going to object to the introduction of the booking slip.

The Court: It is not in evidence, Mrs. Mills. You [282] can't argue from it.

Mrs. Mills: I'm not going to introduce it.

Mr. O'Neil was taken down there the same time that Mr. Runnels was, and they both told you they were taken down there on the 11th of the month, and not on the 10th.

Now, as to the lineup where Mr. Collins identified them, I think if there were only five men in the lineup, including these two, there would be three others, and

he says he thought there was more than two Negroes. There may have been at least one or two other Negroes. Naturally he expected to see the people that had held him up, and I don't think that adds anything to what he said about the description of the two men.

He also said, as to the Kidnaping charge, that they never touched him, that they just drove him in his car, and then let him out further away from the market. I know that, under the technical description of kidnaping, that is considered kidnaping.

We have no evidence that this gun was loaded even, although they had it loaded when it was picked up off the grass. We have no idea when it was loaded.

They have told you, at least Mr. O'Neil has told you, when he opened the glove compartment and saw the gun in it, he was shocked and scared, and threw it out, which was certainly an effort to get rid of a gun. He had, [283] no intention of hanging on to that thing.

I think it is not beyond reason to expect that Mildred Manchester would remember the date, and the other people would remember the dates, because if some friend of yours or a relative, as the case may be, has been arrested, you're certainly not going to have any trouble remembering that particular day, as to what day of the month it is.

Now, I don't know from the facts, as I said, I'm not trying to prove one thing or the other. Perhaps I'm trying to present all of the evidence to you, and I don't know whether you will find that he did not make the statement, which Mr. Runnels tells you he didn't. I don't know whether the officer might have

written it down, because all the facts in the statement are what he would have gotten from the officer, and the other officers, you know, that had been from the Culver City Police Department, and also from the victim. Those facts he had already been in possession of.

Now, for the sake of argument, if you found that he did make the statement, then you would have to determine whether or not it was voluntary, and Officer Traphagen, of course, did not beat this man, but if he asked this woman to get in touch with him and to persuade him to make a statement so that they could try to get him the five to ten years, instead of a life sentence, I think [284] that would come under the heading of involuntary and coercion.

She said that he did call her, as the officer said he would have him call her, and he called her at home, and she got the message, and she told him what the officer had said.

I think Officer Traphagen may have honestly felt that this was in the defendant's best interest, Defendant Runnel's best interest. He had known him since he was a boy. He might have felt that it was in his best interest to have him make this confession. That may have been why he did talk to her and ask her to make it, although he said he didn't.

However, he was kept at the Culver City and Wilshire Jails from the early hours of February 9th through the 10th, and up to the 11th, before they took him down to County Jail, and I don't know when this so-called statement would have been given.

The officer said it was the same day that he took him to County Jail, and yet Miss Manchester was told the early morning of the 11th there was no statement, and the officer said he had the statement on the 10th.

Now, there are these four charges, and they are all very serious, and Mr. Peven has given you the correct definition of all of them, and I do not need to go into that at all. [285]

It was very proper on his part to have told you that there is quite a technicality involved as to whether or not either one of these men was armed at the time of the arrest, and I believe that I would agree with Mr. Peven that they were not actually armed, either of them, at the time of the arrest.

Now, he mentioned that the defense attorneys would be screaming about the identification, and of course we are, because it is a very serious matter to put anybody in jail, or even to the test of a trial if you have got the wrong person, but of course we have no other way of doing it except by a trial, and the defense is to put on the evidence that the defendants tell us is pertinent. If we said, "Well, that isn't right; you shouldn't present that because we do not think it is maybe something that actually happened," we would be making ourselves the first judge.

Mr. Cuff, who was a Public Defender for a long time, told me when I first came into the office, "Well, when one of your defendants says he is innocent, back him up to the last limit, because I had a man accused of murder." A man had been found murdered

on First Street, just down here near Spring, and there was nobody else on the street except the man who was picked up and charged, the defendant in that case, and he was found guilty, and Mr. Cuff thought he was guilty, although he put up a good [286] defense, and after five years the man spent in State Prison, another man was arrested on a different charge, and then he told the officers, "There's a man up in State Prison who is doing the time I ought to be doing." Of course that cleared the man, and there is no question about it that they would take the proper steps to see if the confession first was a true confession, and, if so, release the other man, but those things happen, and we have to present all the evidence.

Mr. Peven said, "Why should the officer lie?" and I really don't think the officer was intentionally lying. He may have got confused. He may have even written this up, thinking this is what the defendant would say, and put it aside, and it's four or five months ago. He may have thought this is what would be said. It's just an oral statement. There is nothing in writing, and his memory could be a little bit vague on that. He certainly didn't remember the dates too well, as you remember. He thought that he brought him down on the 10th, and it was the 11th.

I don't think I need to go over what Miss Manchester said, as the dates, I think, she was very definite about that, several times she went down, and the hours, and her asking the officer if Roosevelt, meaning Mr. Runnels, had made a statement to him as yet,

and the officer—that was on the 11th, the early hours [287] had said no.

I hadn't mentioned yet about Mr. Brooks seeing the defendants with a third man—he didn't know the name of the man at the Top Cat—and seeing some keys passed between the man at the Top Cat and the two men who were seated in the car.

Now, the two defendants, Mr. O'Neil and Mr. Runnels, had both told you that they met this man Garrett, and that they borrowed the car from him, and that it was about midnight that they got the keys from Mr. Garrett in front of the Top Cat and drove around in it.

Then we had testimony from several people, this Loydean Mayfield, and the other—I can't remember their names now—but the other lady who said that they had been at Mr. O'Neil's home that evening, that they had—the mother had been listening to the television news and it was while she was listening to that—and she was on the telephone talking to someone—that her son passed her and had just given a sort of farewell gesture, and he leaves the house.

Mr. Collins said this happened sometime between 10:00 and 10:30.

Now, the young men both had some money on them at the time they were picked up. One of them had owned a car until quite recently. It seems to me that this quite easily might be a case of mistaken identity, and that [288] the boys had proved that they were somewhere else at the time this happened, that unfortunately they got hold of this car and were arres-

ted in the car, and the rest of it, of course, is the fact that they were brought to trial, and I hope that, if you feel that the People have not proved their case beyond a reasonable doubt, that you will find the defendant not guilty.

Thank you.

The Court: Mr. Black. [289]

### ARGUMENT

Mr. Black: Thank you.

Your Honor, Mr. Peven, Mrs. Mills, and members of the jury:

I shall make my argument short and to the point.

I direct your attention to February 8, 1965, in the evening hours between 10:00 and 10:30 p.m., and I ask you where were you at that time?

Have you thought about it? Have you considered it? Has it ever been of any importance to you to know exactly where you were at a certain date? This is very important to the defendants. They are charged with Kidnaping; they are charged with Robbery; they are charged with Grand Theft Auto; they are charged with what we might call Felony Joyriding.

I represent Defendant O'Neil. Defendant O'Neil has testified that he was at home between the hours of 9:00 p.m. and 11:00 p.m. on February 8th, 1965.

I presume that most of us were at home at those hours.

To corroborate the Defendant O'Neil's story as to where he was, we have the testimony of his mother, Mrs. O'Neil, that he was home between those

hours. [290] We have the testimony of Mrs. Mayfield that he was home between those hours. Yet we have Mr. Collins, who testified that between 10:00 o'clock and 10:30 he was accosted in a parking lot at the Better Foods Market, and asked to drive three and a half blocks.

Two persons were in his automobile, one of whom was seated in the passenger seat, and one of whom was seated in the rear seat.

His wallet was removed, and he was put out of the car, and his car was then driven off by these two parties who accosted him.

Now, as to the charge of kidnaping, Mr. Collins says he was removed a distance of three and a half blocks.

First you have to believe Mr. Collins. Next you would have to consider whether or not we are talking about kidnaping. Three and a half blocks. Or, are we thinking about in terms of the Lindbergh Case, or even Frank Sinatra, Jr. Is that the kind of kidnaping?

This is the issue that you have to decide, whether or not this is kidnaping, whether or not Mr. Collins himself is credible on those charges.

The defendant was not there at the time and could not testify. We have Mr. Collins' word as to what went on between the hours of 10:00 o'clock and 10:30. Mr. Collins also says that the person who got in the front seat was five feet tall, that he thereafter, on February 11th [291] two days later, went to a police station, looked at a lineup. He doesn't know how

many people were in the lineup, but he selected Defendant O'Neil as a person who was in the front passenger seat.

Mr. Collins was asked whether or not there were any distinguishing features about the person in the front passenger seat, and Mr. Collins said no, there were no distinguishing features.

Mr. Collins was asked, "How long of a length of time did you look at this person in the front seat?"

Mr. Collins says it was only a matter of a few seconds, so there is only a matter of a few seconds that he had a chance to look at the person who was in the front seat, in the passenger seat, and that, from a distance from the Better Foods Market to, I believe it was, St. Andrews Place, a distance of three and a half blocks, and he had only a few seconds to actually glance at this person that was in the front passenger seat, and it is important as to whether or not this glance and the person he identified as a passenger is true.

Now, in regard to Defendant O'Neil, he testified that he saw the Defendant O'Neil at the police station, and he doesn't know how long he looked at the lineup.

Again he doesn't know how long he looked at the lineup, but the person he selected in my mind resembled [292] if there is a resemblance, the person who may have been in the passenger seat.

Mr. O'Neil is not five feet tall, but Mr. Collins testified that the person was five feet tall, and he may have been leaning over, but he was five feet tall. This is Mr. Collins' testimony.

You see Mr. O'Neil, he stands every bit of six feet, and not one inch under.

Mr. Collins was asked what clothing that this person had on. He said he didn't know. He doesn't know, but only a few seconds, that is all that he had, and that is what he based his identification of Defendant O'Neil upon, just that few seconds.

He testified on direct that the events occurred at 10:30 p.m.

He testified on cross examination, when I asked him, he said it occurred at 10:00 o'clock, between 10:00 o'clock and 10:30; it could have been as much as five minutes to 10:00. He is not even sure of the hour, but at least we know it is between 10:00 o'clock and 10:30. These are the hours that he has been testifying to.

Mr. Collins was asked how many people were in the lineup at the police station. He testified he didn't know, but more than two, when he was asked as to their race, but more than two were Negroes, but he felt that there were five people in the lineup. [293]

He was asked whether or not his identification was based upon a full-face view or profile view. There never was an answer to that question.

He was asked whether or not he was positive of his identification. He stated he was positive of his identification. He testified to this when we heard him, but we know that in the telephone conversation that he had with Mrs. O'Neil at the time she called him, he stated to her, "I'm not sure." Just those words alone. "I'm not sure." This is what he told her. "I'm not sure, but your son resembles the man who was in

the car." Resembling a person and actually being that person are two different things.

Perhaps you can recall during the Second World War at which time Field Marshal Montgomery often had someone make certain appearances for him, and this particular person resembled Field Marshal Montgomery but he was not Field Marshal Montgomery. He fooled even the experts.

It is also true that Hitler had many persons to make certain appearances for him, but he, too—that is, the person who was making these appearances—resembled Hitler; it was not Hitler.

Again on the issue of identification, what else do we have besides the fact that the defendants were at the residence of 52nd and Denker Street, a long way from the Better Foods Market at Western and Santa Barbara? [294] The fact that they were there at a certain hour, the fact of the telephone conversation where Mr. Collins says he was not sure of Defendant O'Neil, but Defendant O'Neil did resemble the person who was in the passenger seat, what else do we have besides those two things?

There has been much ado about the money that Mr. Collins had offered Defendant O'Neil. Mr. Collins says it was a dollar for cigarettes, because he felt sorry for Defendant O'Neil. Mr. Collins denies that he offered a fistful of money for Defendant O'Neil, but he admits he had a fistful of money in his pockets at that time.

Now, why should he make such an offer? Is that to buy his peace, buy his conscience and to convict De-

fendant O'Neil? He wanted to teach the person who was in the passenger seat with him on February 8th between 10:00 o'clock and 10:30, wanted to teach that person a lesson? That is the lesson he wants to teach to that person, but is it to Defendant O'Neil? I say no, it was not.

As you know, Defendant O'Neil has been in custody ever since the day of his arrest. He has testified to that.

Now, Mr. Collins offered a fistful of money to the defendant at a prior hearing. Mr. Collins says he felt sorry, but what was that money for? To obtain good counsel? Private counsel? To buy his peace? Can you [295] make a wrongful identification, swear to it once under oath, and know that you're bound to come back to court again to testify again, and swear to it again? Is this what Mr. Collins had in mind? He didn't deny that he offered money, and does it take a fistful of money to buy cigarettes? Or is that common, necessarily? What is necessary in order to retain counsel, or what is he buying? His peace or conscience? How much money does it take to buy a man's life?

There has been testimony here that the charges upon the conviction would necessarily mean that a man's life would have to necessarily stay in State Prison. Does it take a fistful of money for that? Would you bet your life on the identification of Mr. Collins on a few seconds' glance, and then accept right outside the courtroom a fistful of money? No, you bet you wouldn't.

Leaving the charge of Robbery and Kidnaping and arguing those facts, we are now met with the charge of Grand Theft Auto.

Defendants say they weren't there. They were met with the charge of the Joyriding, or Felonious Joyriding. Where are the circumstances on the joyriding itself?

We know that the defendants were not there on February 8th between 10:00 and 10:30. Someone was there. Who was that someone? [296]

We know that Defendant O'Neil left home at 11:00 o'clock, proceeded by way of bus to the area of Pico and Western, stopped at a lady's house, who was not home, left and went to the bus corner. There was no bus coming, and he thumbed a ride home. While he is thumbing a ride home, here comes Garrett in a white vehicle, a Cadillac.

Arrangements are made, and Garrett takes them to 61st and Vermont, stating that he had some business to take care of there, and while there at 61st and Vermont Garrett leaves with someone else after being asked whether or not his car could be used. He is asked about the use of his car by Defendant O'Neil. Garrett condescends, or at least consents, to the use of the vehicle itself. Garrett then hands the keys to Defendant O'Neil. Mr. Brooks testified that he saw the keys handed to Defendant O'Neil. Defendant O'Neil is in the car. He has gained possession of the car from Mr. Garrett. He has not checked the registration. He has not asked Mr. Garrett about ownership of the car. He has testified to us that he is used to Mr. Garrett driving different automobiles.

Now, Defendant O'Neil is a passenger in the car. He is not driving, and as a passenger he rides from the Top Cat Club at 61st and Vermont, down Vermont to Washington, making a left-hand turn on Washington Boulevard to go westbound to Santa Monica, down Washington Boulevard [297] and to an unfamiliar area, Culver City.

He is still a passenger. Going through Culver City they are lost, and he is still the passenger. He is searching for a light, matches, with which to light a cigarette. He goes into the glove compartment. He sees this weapon. He is shocked, surprised, makes a comment to the driver of the vehicle, and then throws the weapon outside of the vehicle. A natural reaction, and why shouldn't it be? It was a natural reaction on his part when he received the keys to the automobile. He did not have a driver's license. He knows he can't drive in California without a driver's license. He knows that is against the law. He likewise knows it is against the law to have a weapon in an automobile. "Why should Garrett give me an automobile with a weapon in it?" So his natural reaction is to throw it out the window, and he throws it out the window, and we know it is only at that time, not before, only at that time that the police stop the automobile.

When he saw the weapon going out of the window, he turns on his lights and turns on his siren, and the automobile immediately pulls over to the side and stops. That we know.

Now, what did the officer say that he stopped them for? Robbery. Even though he himself knew and

testified on the stand there was no robbery committed. [298] He knew of no robbery, but yet he said he stopped them for robbery only because he had inquired of the liquor store owner that there was a white vehicle; no description of a vehicle, just a white vehicle. Your white Chevrolet, your white Corvair, your white Plymouth, or whatever car it was, only that there was a white vehicle in the area, that was all, with two male Negroes in the car. That was all that he had. All the information he had. He thereupon took up pursuit. No one saw him, no one paid any attention to him, no one was worried about him coming. No one was doing anything wrong. The only thing that we have is Defendant O'Neil's throwing the weapon outside of the vehicle itself, right out through the window, a natural reaction, totally natural. He was shocked and surprised to see it in there, wondering, "What are you loaning me a car with a weapon in it for?" Nothing unusual. A few seconds is important to Defendant O'Neil. We know his defense is that he was at home. That we know, and we know that he does not have to prove his defense beyond a reasonable doubt, and we know that we have not, in criminal law at least, placed an undue burden upon the prosecution to prove his case beyond a reasonable doubt. The defendant does not have to prove his case beyond a reasonable doubt, where he was beyond a reasonable doubt, but the prosecution has to prove exactly where Defendant O'Neil was beyond a reasonable doubt. This we know, and it is not an unfair [299] burden, not in light of the charges, no matter what the charge be, Murder, or whether the

charge be Kidnaping, Robbery, Grand Theft Auto, Joyriding. The law protects Defendant O'Neil. It protects you, and if there is any doubt in your mind, or if you feel that the evidence is in such a state that if you look at it one way the defendant is innocent, and if you look at it another way the defendant is guilty, then it is your duty to look at it that way, and look at the evidence and interpret the evidence so that you can find the defendant innocent.

If you have two reasonable interpretations of the evidence the defendant must be found innocent. I can't tell you which way you should vote, because the Court will instruct you that you are the sole triers of the facts, and I ask you again, think of a few seconds' glance at the face, and at what was identified as People's No. 1, a gun. You look at the gun first. You look at the face first. Whichever way it is, or whichever way Mr. Collins did. It is just a few seconds.

With that I submit it. Thank you.

The Court: Mr. Peven. [300]

### CLOSING ARGUMENT

Mr. Peven: I think Mr. Black just—right on the heels of his argument, right at the very end where he says if you have two reasonable interpretations of the evidence, you can adopt that which is reasonable and which points to the defendants innocence, adopt that, I think he should have also told you, of course, if it proves beyond a reasonable doubt, this evidence appears reasonable to you, and you feel beyond a reasonable doubt that it points to the defendants'

guilt, then you are to adopt that view. I think that we have got to look at, basically here, what is reasonable, and obviously, counsel are trying to claim that the defendants have said to you here the last couple of days is reasonable, and this is something that you're going to have to determine.

Now, Mrs. Mills did a lot of talking, and she talked about everything but the case, I think.

She mentioned all kinds of cases about misidentification; she talked about all sorts of things; she talked about her ex-boss in the Public Defender's office. What these things have to prove, I don't know.

Obviously you have read about cases of misidentification. I have read about them. Unfortunately there might have been—there have been times in the past [301] where people were wrongfully convicted because of eyewitness testimony. Everybody knows that.

Now, Mrs. Mills pointed out to you a few cases. I don't know if I can stand up and point out the cases that are correct identifications, because they are in this County and all over the State, and I assure you all over the United States, there are probably hundreds and thousands of people that are convicted during the course of a year, and when you add that up over a number of years, on identification testimony, people who commit robberies, burglaries, all sorts of crimes, how many of these people were convicted, imprisoned, or whatever their punishment is, how many of these cases do you read about that are wrongful identification? How many of them?

It's also nice for defense attorneys to stand up and talk about misidentification, because obviously

in this type of case that is all they have to talk about, because the man has identified them.

I'm not going to go all over my points again, but as I say, it is easy to stand up and say, "Well, the man is misidentifying," but you have got to look at his identification. You have got to look at all the circumstances surrounding what the man tells you, Mr. Collins in this case, how does he identify them?

It is not a case where he merely points out and says, "That's the man." He tells you why he identifies [302] the defendants. He tells you how he identifies the defendants, and when Mr. Black tells you all this time, he keeps on saying all this time it was but a few seconds, I don't think he is quite telling you the whole story here.

First of all, Mr. Collins, when he talked about Runnels, what did this testimony say? Did he just say, "Runnels is the man"? No, he explained about Runnels, and it was gone into on cross examination. He says he saw him very good when he got in the car, because Runnels had to get very close to him when he got in.

Now, that is one thing. That is not just a quick glance. The man has to get close to him, because he had to lean forward in the front seat, and when Runnels is coming into the seat, he had to look at him in order to get close to him.

Also, when he says he got out of the car, you remember the point when he was standing out of the car and Runnels was going from the back seat to the front seat, he said Runnels was standing in the street hesitating, and he glanced at him, looked at

him there. There is Runnels again. It's not just a quick glance, as counsel would have you believe.

What about O'Neil? Was it just a second like Mr. Black would have you believe here, just a matter of a couple of seconds? I think you have got a little bit more than that. What does the man tell you? He says at [303] first he thought it was somebody getting in there, playing a joke on him, getting in the car and, "All right, lean forward, and don't look," and this and that, with a gun. He thought it was somebody playing a joke. He thought a friend of his might be doing this, so he looked at the man to recognize him, to see who it was, if it was a friend of his, or what, and so he took a look at him.

He says he looked at his face for a few seconds. The man was in there in the seat next to him. He was looking to see if it was a friend of his, but as it turned out it wasn't a friend of his, but it was Mr. O'Neil.

Now, I think you have got a little bit more than just these brief seconds, the way counsel would have you believe.

In addition, as I say, again when you talk about identification, it is not that alone, because you will always have defense counsel, if that is all you have in a case like this, just identification, particularly as to one defendant, with no other evidence whatsoever, then they have really got something to argue about, and people do make mistakes, but when you couple that with the gun, the fact that O'Neil's got the gun that looks like the same gun, couple that with the

fact they are in the car, the very same car a short while after in a couple of hours, two to three, after the car is taken from him, they are there in the car riding around in the same way that he says, [304] they drove off in the car, and you couple that with the confession of Rannels, I think you have got just a little bit more than this, this few seconds identification that these people would have you believe.

Now, when they talk about Mr. Collins, first, there is Mrs. Mills; she praises him, talks about how nice a man he is, how he is a kind man, and then Mr. Black turns around and cuts him up one side and down the other.

What is this for, about money and cigarettes? A big deal made out of this.

Now, Mr. Collins tells you he felt sorry for these people after the preliminary hearing, after he has testified. He didn't feel he made any mistake. He was sure. He was positive. He was positive when he testified the other day, but he felt sorry for the fellows, offered him a dollar for cigarettes.

Like I say, Mrs. Mills praises him. This is a kind gesture. He is a nice man, and Mr. Black, for this gesture, tears him up one side and down the other. "Is he trying to buy his conscience," trying to do this, trying to do that? You heard the testimony. If you feel that because of this, what he did, offering the man a dollar for some cigarettes, that he is trying to ease his conscience out, he is getting up here and he is not sure like he says he is, well, then, again just walk the people out of the courtroom. [305]

Now, Mr. Black tells you about Mrs. O'Neil. Who is this? The mother of the defendant. She calls up Mr. Collins. Now, Mr. Collins tells you he never told her anything about that he wasn't sure, because Mr. Collins tells you at all times he is positive, and he tells you on the stand here again. Mrs. O'Neil says he said something about he wasn't sure, and also said he wasn't coming back to court. Well, there he was. He sure was here in court, and it didn't look like he was in any chains. There was no one dragging him into court screaming. He was there and he came up on the stand and testified. He denies saying these things to Mrs. O'Neil.

I think the state of the evidence—I can't see anything to counter the fact that the man says he is sure.

Now, Mr. Black tells you there is nothing unusual, he keeps saying there is nothing unusual about the man throwing the gun out of the window. Well, sure, this happens every day. People in Los Angeles find guns in cars and throw them out of the window.

Well, of course it is unusual, no matter what Mr. Black says to you.

Is this a natural reaction for a man, who supposedly found a gun in a car, to throw it out of the window, and do you believe these defendants? Do you believe these defendants when they tell you, particularly [306] O'Neil, that he threw the gun out of the window, and he didn't know about that Culver City police car? Because that Culver City officer said within about a half a block from the time that gun was thrown out of the window the car was stopped. He was following that car, attempting to stop it.

Mr. O'Neil says, he didn't know anything about any police car. The only reason he threw it out is because he was so shocked, and Mr. Black says it is just so natural to throw a gun out of a window all the time.

You talk about what is reasonable. Look and see if it is reasonable to feel that they did not know that that police car was right behind them, and if that isn't the reason the man threw out the gun, because he didn't want to get caught with it.

He knew he was going to get caught in the car. There's no question about that. He is in there.

Now, you talk about the lineup. Mrs. Mills just passes that over altogether, hardly even mentions that, and Mr. Black talks about the lineup. This is again something, when you look at it, when you talk about identification, is there anything more than just this one fleeting glance? He goes down the police lineup and points out the two defendants, and again there was no equivocation about it. He says he was sure. There they were in the lineup, and he is sure. [307]

Now, there is more than two male Negroes in the lineup. There is more than that. When he tells you how many, he says he doesn't remember, five, six, something like that, but there were more than two male Negroes in there. Now, if he is going to make a mistake, how is it he just happens to get these two? Why couldn't he have picked out another male Negro than this, but he is sure, and he picks out these two.

Again I submit to you this is again another step in corroboration to show that the man is not mistaken. He is not lying to you. He is not trying to

buy his conscience, like Mr. Black would have you believe.

Now, Mrs. Mills, try as she would, couldn't explain away this confession of Mr. Runnels, because Mr. Runnels says he didn't make any confession. Officer Traphagen says he did. Mrs. Mills says something about, "Well, I'm not saying Mr. Traphagen is lying. He might be confused, or something."

I think she is a little bit too kind. I don't know why she doesn't come out and say he is a liar. He has to be lying if Runnels—what Runnels says is true and he didn't make a confession, and you heard the confession, and it is quite detailed and covers pretty much everything that was supposed to have happened this night.

If you believe that he didn't make this [308] statement, and he didn't say that to Officer Traphagen, well, then how could Traphagen be confused enough about that to make up a story like that, confuse it with another case, or something like that? Obviously he is lying then, and so you're going to have to judge the credibility.

When I say credibility, who is telling the truth, I don't mean to be like Mrs. Mills and be pitty-patting around, either somebody is lying or isn't lying. There is no confusion here. When you say who is telling the truth, you are going to have to judge between Officer Traphagen and this defendant, because they both can't be telling you the truth about that statement, whether there was one made or not, and you are going to have to consider who has got the most reason to lie, and you are going to have to judge the demeanor of the

witnesses on the stand, Officer Traphagen and this defendant, and make up your own mind who was telling you the truth about whether or not there was a confession or there wasn't a confession. There is nothing I could tell you that would make up your mind one way or the other. You are the only ones who can judge who is telling you the truth, and that's what we want, the truth, between Mr. Collins and these defendants.

Now, if you're going to look and see what is reasonable, what stories are reasonable, is it reasonable for a man that has just stolen a car, somehow gotten possession of a stolen car, because that's what Mr. Collin's [309] car is, is it reasonable for this man to then turn it over a short while later to these defendants? Is that reasonable?

Incidentally, where is this Mr. Garrett? All this talk we have heard these two or three days, we have heard about a Mr. Garrett. Where is he? This Defendant O'Neil, he knows where he lives. Oh, yes, he is in custody. I know he can't walk out of the County Jail and go get him. He has a lawyer. Defense counsel are able to bring in witnesses. He has a mother and a sister, and other people.

This man here, Runnels, his defense depends just as much on this Garrett as O'Neil. He is not in any custody. Why didn't he bring in Mr. Garrett? Where is Mr. Garrett?

Here is the man. The whole key to the defense hangs on this Mr. Garrett, and where is he? No place to be found; no explanation.

I submit to you that there is no Mr. Garrett. There might be a man named Garrett, James Garrett; make up any name, or there might be a man named that, but where, is he? I submit to you is it reasonable to believe that there is a Mr. Garrett, and that Mr. Garrett just happened to come by with this man's car that was just taken a little while before, and he just turned it over gratuitously to these defendants to go to Santa Monica? After midnight they are just driving out to Santa Monica on some kind of a lark to see some girls. They don't call the girls up. [310] They just drive out to Santa Monica and look.

All of you people, or some of you, obviously know the City better than I do, some know it better than others, but start considering the distance these people are traveling, from one defendant to the other. One is living at 54th and Denker, and the other is living on 35th Place. Consider how far that is. Are they going to be walking from one house to another? Are they going to take buses the way they tell you? Are they going up to Pico and Western, then when they are supposed to be going home, would they get in a car? And where do they end up? They are supposed to be—the man is taking them back down there to ride on Western Avenue, and O'Neil lives right down Western Avenue. Denker is only a couple of blocks off Western. Why does he go? They end up at 61st and Vermont. Then if they are going to Santa Monica from 61st and Vermont, where did they go? They go all the way up to Washington Boulevard, and now they are riding all the way on Washington Boulevard.

They are going to go all the way out Washington Boulevard down to Santa Monica. Why? What did they pass? They passed right by the Santa Monica Freeway, and I ask you is this a slip of the tongue about the freeway that Mr. O'Neil blurted out? Was he on the freeway, or wasn't he?

Mr. Black: Your Honor, I'm sorry to interrupt the argument, but there is no evidence about a freeway here. [311] All the evidence—

The Court: I think, as I called to your attention yesterday, counsel, the defendant said freeway and corrected himself. It was either a slip of the tongue or he made a mistake.

Mrs. Mills: Your Honor, I didn't want to interrupt Mr. Peven, but he did misstate the testimony or the evidence as to where Mr. Runnels lives. He doesn't live at 35th. It's 63rd, 63rd and Broadway.

Mr. Peven: I don't know where Mr. Runnels lives. All I know is they said Mr. Runnels lives about a half hour's distance from Mr.—335 West 63rd Place.

Now, we have got another little bit of conflict. I don't know how big a conflict it is, but someone, they are badly mistaken telling lies here.

Do you remember when the officer says—the Culver City police officer, the arresting officer, became aware of the car? It was in the alley. He drove down the alley, he says, a couple of blocks, slow. Then he gets out into the street. That is when he was able to intercept it, when he got out into the street.

O'Neil says yeah, there is something about an alley, but they don't know how far they were in the alley,

but Defendant Runnels said they weren't in the alley. They just turned around in the alley. They weren't in there behind that liquor store, but they just turned around [312] in there, backing up, but the officer says they were in the alley for a couple of blocks.

Now, the officers are either badly mistaken here or lying. I don't know why this Culver City police officer is going to come in here and lie to you.

Again, is it reasonable? Are they supposed to be so shocked after finding the gun, so shocked about this that they are going to turn right around and go home?

They are on Washington Boulevard, according to the testimony. Why don't they just turn around on Washington Boulevard and go home, go back the way they came?

No, what did they end up doing? They ended up on Tilden Street. What are they doing on Tilden Street?

I think that is about all I have got to say. I hope I have covered everything. You heard the evidence anyway. Nothing I can say is going to change your understanding of the evidence anyway. I feel, again as I say, that you have got these stories, and everybody here can't be telling you the truth.

Like Mr. Black says, what is reasonable. Just examine the defendants' stories. Examine the People's evidence, and you look and see which is most reasonable.

You people, you twelve people when chosen as jurors, you don't get some special aura, you know, that they stamp you and say you're a juror now.

You are not supposed to leave your common sense out in the hallway or [313] home just because you are sitting in a jury box.

You take it with you, and you look and see, and judge, and that is what you are, judges, see which stories are reasonable, who it is that there is some lying going on here, and obviously somebody is lying here, who it is that is going to be more likely to be telling you a lie, what reasons they might have for telling you a lie. You judge the credibility of the witnesses. I feel that after you have judged this, looked at all the evidence, that you will find that the People have proven their case beyond a reasonable doubt as to Kidnaping, Count I; the Robbery, Count II—and that it is a First Degree Robbery, because they were armed with a deadly weapon, the revolver—and in Count IV, the Joyriding charge, because, like I say, I don't feel that it has been proven there was shown any intent to permanently deprive Mr. Collins of his automobile, and I feel that also, besides this, we have shown defendants, certainly at the time of the commission of these offenses, were armed with this revolver, and that is certainly a dangerous and deadly weapon, especially when it has got four bullets in it.

Thank you.

The Court: Because of the hour, ladies and gentlemen, the Court will defer instructing you until tomorrow morning.

Would it be agreeable, counsel, to instruct [314] the jury at 9:00 o'clock in the morning prior to calling our calendar?

Mr. Black: Yes, your Honor.

Mrs. Mills: Yes, your Honor.

Mr. Peven: Yes.

The Court: Ladies and gentlemen, we will recess this case until 9:00 o'clock tomorrow morning.

Once more I remind you of the admonishment of the Court regarding discussing the case and regarding forming any opinion thereon.

(Whereupon, the proceedings in the above-entitled matter were adjourned until Wednesday, May 19, 1965, at 9:00 o'clock a.m.) [315]

Los Angeles, California, Wednesday, May 19, 1965;  
9:10 A.M.

The Court: People against Joe J. B. O'Neil and Roosevelt Runnels.

Mrs. Mills: Ready for Defendant Runnels, your Honor.

Mr. Black: Ready for Defendant O'Neil, your Honor.

Mr. Peven: Ready.

The Court: Is it stipulated, counsel, that the jury is all present?

Mr. Peven: Yes, your Honor.

Mr. Black: So stipulate.

Mrs. Mills: Yes, your Honor.

(Whereupon, the jurors were instructed by the Court.)

The Court: Will you swear the bailiff, please.

(Whereupon, the bailiff was duly sworn by the Clerk of the Court to take charge of the jury.)

(Whereupon, the jury retired to deliberate at 9:40 o'clock a.m.) [316]

Los Angeles, California, Wednesday, May 19, 1965;  
3:55 P.M.

(Whereupon, the jurors returned to the courtroom at 3:55 o'clock p.m.)

The Court: People against Joe J. B. O'Neil and Roosevelt Runnels.

Mrs. Mills: Here for Defendant Runnels, your Honor.

Mr. Black: Defendant O'Neil is present and ready.

Mr. Peven: People are ready, your Honor.

The Court: Ladies and gentlemen of the jury, have you reached verdicts in this case?

The Foreman: Yes, your Honor, we have.

The Court: Would you give them to the bailiff, please.

Will you read the verdicts.

The Clerk (Reading.)

"Superior Court of the State of California, for the County of Los Angeles.

"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the defendant, Roosevelt Runnels, guilty of Kidnaping for [317] the purpose of Robbery, a violation of Section 209 of the Penal Code, a felony, as charged in Count I of the Information.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the defendant, Joe J. B. O'Neil, guilty of Kidnaping for the purpose of Robbery, a violation of Section 209 of the Penal Code, a felony, as charged in Count I of the Information.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant, Roosevelt Runnels, for being armed at the time of his commission of the offense as contained in Count I of the [318] Information true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant, Joe J. B. O'Neil, of being armed at the time of the commission of the offense as contained in Count I of the Information true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant Joe J. B. O'Neil of being armed at the time of the arrest, as contained in Count I of the Information, not true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman." [319]

**"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.**

**"We, the jury in the above-entitled action, find the defendant, Roosevelt Runnels, guilty of Robbery, a violation of Section 211 of the Penal Code, a felony, as charged in Count II of the Information, and find it Robbery of the First Degree.**

**"This 19th day of May, 1965.**

**Signed: William J. Thorpe, Foreman."**

**"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.**

**"We, the jury in the above-entitled action, find the defendant, Joe J. B. O'Neil, guilty of Robbery, a violation of Section 211 of the Penal Code, a felony, as charged in Count II of the Information, and find it to be Robbery in the First Degree.**

**"This 19th day of May, 1965.**

**Signed: William J. Thorpe, Foreman." [320]**

**"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.**

**"We, the jury in the above-entitled action, find the charge against the defendant, Roosevelt Runnels, of being armed at the time of the commission of the offense as contained in Count II of the Information true.**

**"This 19th day of May, 1965.**

**Signed: William J. Thorpe, Foreman."**

**"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.**

**"We, the jury in the above-entitled action, find the charge against the defendant, Joe J. B.**

O'Neil, of being armed at the time of the commission of the offense as charged in Count II of the Information true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman." [321]

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant, Joe J. B. O'Neil, of being armed at the time of the arrest, as contained in Count II of the Information, not true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the defendant Roosevelt Runnels, not guilty of Grand Theft, a violation of Section 487, subdivision 3 of the Penal Code, as charged in Count III.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above- [322] entitled action, find the defendant Joe J. B. O'Neil, not guilty of Grand Theft, a violation of Section 487, subdivision 3 of the Penal Code, as charged in Count III.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the defendant Joe J. B. O'Neil, guilty of violation of Section 10851 of the Vehicle Code, a felony, as charged in Count IV of the Information.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the defendant Roosevelt Runnels, guilty of violation of Section 10851 of the Vehicle Code, a felony, as charged in Count IV of the Information. [323]

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant Joe J. B. O'Neil, of being armed at the time of the commission of the offense, as charged in Count IV of the Information true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

"The People of the State of California, Plaintiff, versus Roosevelt Runnels, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant, Roosevelt Run-

nels, of being armed at the time of the commission of the offense, as charged in Count IV of the Information true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman." [324]

"The People of the State of California, Plaintiff, versus Joe J. B. O'Neil, Defendant, Case No. 301136, Department 116.

"We, the jury in the above-entitled action, find the charge against the defendant, Joe J. B. O'Neil, of being armed at the time of the arrest, as contained in Count IV of the Information not true.

"This 19th day of May, 1965.

Signed: William J. Thorpe, Foreman."

Ladies and gentlemen of the jury, are those your true verdicts as to each defendant, as to each Count, so say you one, so say you all?

The Jurors: Yes. [325]

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**EXCERPT FROM CLERK'S TRANSCRIPT: INSTRUCTIONS**

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to determine the issues of fact that are presented by the allegations in the information filed in this court and the defendant's plea of "not guilty". This duty you should perform uninfluenced by pity for a defendant or by passion or

prejudice against him. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested for these offenses, or because an information has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

Therefore, in determining the guilt or innocence of the defendant you are to be governed solely by the evidence introduced in this trial and the law as stated to you by the Court. For such purpose the law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict as to each count charged, regardless of what the consequences of such verdict may be. Such verdict must express the individual opinion of each juror. [19]

The People and the defendants all are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your

fellow jurors may have come to a different conclusion, or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision. [20]

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance. [21]

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question

to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. [22]

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

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The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it. [23]

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may base their findings, whether favorable to the People or to the defendant,

provided, however, that to support a verdict of guilt, the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law.

One type of evidence is known as direct evidence and the other as circumstantial evidence. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses, perceived such conduct or any part thereof, and which testimony describes or relates what thus was perceived. All other evidence admitted in the trial is circumstantial evidence in relation to the conduct of such person, and, insofar as it shows any act, statement or other conduct, or any circumstance or fact tending to prove, by reasonable inference, the innocence or guilt of the defendant, it may be considered by you in arriving at a verdict. [24]

If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt. [25]

I instruct you further that you are not permitted, on circumstantial evidence alone, or when the case of the People rests substantially on circumstantial evidence, to find the defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion. [26]

When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt. [27]

You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and after-

wards was ordered stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were or were not true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for all parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, any party has admitted a fact to be true, such admission may be considered by you as evidence in the case. [28]

☞ You are the sole and exclusive judges of the credibility of the witnesses who have testified in the case. The term "witness" includes every person whose testimony under oath has been received as evidence.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, that is, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, for or against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may be im-

peached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth. [29]

However, discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. [30]

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as ex-

hibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence. [31]

Evidence has been received in this case tending to show that on an occasion other than this trial the defendant Runnels made a statement tending to prove his guilt of the alleged crime for which he is on trial.

A statement thus made by a defendant may be either a confession or an admission.

A confession is a statement that was made by one who is a defendant in a criminal trial, before the trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances immediately connected with the making of the statement, as shown by the evidence and all other evidence bearing reasonably upon the question.

An admission is something less than a confession in that, by itself, it is not sufficient, even if true, to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in

some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.

If you should find that a confession is untrue in part, you need not reject the entire confession but may consider that part which you believe to be true, giving it such significance and weight as your judgment may determine. [32]

In determining the innocence or guilt of a defendant you must not consider any admission or confession of the defendant unless such statement was voluntarily made. Although the court has admitted evidence tending to show that defendant Runnels made an admission or confession you must disregard such statement entirely, unless you, yourselves, by your own weighing of all the evidence, your own judging of the credibility of witnesses, and your own reasonable deductions conclude that the alleged admission or confession not only was made, but was voluntary. [33]

A statement of a defendant relative to the offense charged is involuntary when it is obtained by any sort of violence or threats, or by any direct or implied promises of immunity or benefit, or by any improper influence which might induce in the mind of the defendant the belief or hope that he would gain or benefit or be better off by making a statement, and when the defendant makes such statement as the result of any such inducement originating with a law enforcement officer. But, even though a statement is made under a hope or belief of benefit, it will not be

involuntary if such hope or benefit originated in the mind of the defendant solely, or was induced solely by the advice or counsel of a relative, attorney, or other person not connected with law enforcement.

The fact that a defendant was under arrest at the time he made a statement or that he was not at the time represented by counsel or that he was not told that any statement he might make could or would be used against him or that he was told that others had made statements implicating him in the crime, will not render such statement involuntary. These are factors to be considered, however, in determining whether the defendant's statement was voluntary.

Where there is a conflict in the evidence, it is for the jury to decide whether the statement was made voluntarily or involuntarily, and in making this determination the jury should govern its action by the same rules as to weighing the evidence and credibility of witnesses as apply to the determination of any of the issues in the case. [34]

Evidence of the oral admissions of defendant ought to be viewed with caution. [35]

Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against any other defendant.

Where evidence has been received of a statement by one of the defendants after his arrest and in the

absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant. [36]

Every person who unlawfully and forcibly steals, takes, or arrests any other person in this state, and carries him into another country, state or county, or into another part of the same county, doing so against the will and without the consent of the person so carried, is guilty of kidnaping. [37]

Any person who kidnaps or carries away any individual to commit robbery is guilty of a felony.

Robbery is the felonious taking of personal property of another from his person or immediate presence, and against his will, accomplished by means of force or fear. [38]

To constitute the crime of kidnaping, as charged in count one of the information, there must be a carrying, or otherwise forcible moving, for some distance of the person who, against his will, is stolen or taken into the custody or control of another person, but the law does not require that the one thus stolen or taken be carried or moved a long distance or any particular distance. [39]

An essential element of crime charged against the defendant in count one of the information is a specific intent to commit robbery. This intent must be a motivating purpose of the action, although it need not be the only such purpose. [40]

Robbery is the felonious taking of personal property of any value in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Robbery which is perpetrated by a person or by two or more persons any one of them being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree.

If you should find the defendants guilty of robbery, it will be your duty to determine the degree thereof and to state that degree in your verdict.

A "dangerous or deadly weapon", as the term is used in these instructions, means any weapon, instrument, or object that is capable of being used to inflict great bodily injury and that is carried by a person with the intention of using the same as a weapon of offense or defense in the event circumstances should appear to him to require that he do so.

To constitute a robbery as being one of first degree because the person committing it is armed with a dangerous or deadly weapon, it is not necessary that such weapon be used; and the degree of the crime is the same whether or not the weapon is concealed from view. [41]

If you find that the crime of robbery was committed and that any one of the persons who committed it was armed with a dangerous or deadly weapon, the robbery would be of the first degree. [42]

When a robbery is perpetrated by two or more persons, any one of whom is then armed with a dangerous or deadly weapon, the robbery is of the first degree, and each person guilty of that robbery is guilty of robbery of the first degree, whether or not he personally was so armed. [43]

It is charged in the information that at the time of the commission of the offenses therein described, the defendants were armed with a deadly weapon, to wit: a revolver; and that at the time the defendant O'Neil was arrested for the offenses of which he is accused, he was armed with a concealed deadly weapon, to wit: a revolver.

If you find the defendants guilty of the crimes thus charged it then will become your duty to determine whether or not they were armed with a deadly weapon at the time of the commission of the offenses [and] whether or not O'Neil was armed with a concealed deadly weapon at the time of his arrest, as alleged in the information, and you will include findings on those questions in your verdict, using a form that will be supplied for that purpose.

The term "deadly weapon", as used in the instruction just given, includes any instrument or weapon of the kind commonly known as a pistol, revolver or any other firearm.

A person is "armed with" a weapon when he carries such weapon as a means of offense or defense. [44]

The unauthorized and unlawful taking or driving by one person of the automobile of another may con-

stitute a violation of either of two statutes, depending on the facts of the case.

One of the statutes to which I refer is that which defines the crime of theft, under which every person who shall feloniously steal, take or drive away the automobile of another is guilty of grand theft regardless of the value of the vehicle.

The other statute to which I refer is Section 10851 of our Vehicle Code which provides as follows:

Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to, or possession of, such vehicle, whether with or without intent to steal the same, is guilty of a felony.

The defendant is charged in count three of the Information with grand theft, and in count four with a violation of Section 10851 of the Vehicle Code. A necessary element of the crime of grand theft is the existence in the mind of the perpetrator of the specific intent to permanently deprive the owner of his property. Such an intent is not necessary in a violation of Section 10851 of the Vehicle Code, an offense which may be committed with specific intent to either permanently or temporarily deprive the vehicle owner of his title to or possession of such vehicle. [45]

The charges contained in count three and count four of the information do not charge two separate offenses, but in effect charge that the defendant committed one or the other of such offenses. If you find that the defendant committed an act or acts consti-

tuting one of the crimes so charged, you then must determine which of the offenses charged was thereby committed. To support a verdict of guilt you must all agree as to the particular offense committed, and if you find the defendant guilty of one of said offenses you must find him not guilty as to the other. [46]

The defendants are charged in count three with the crime of grand theft auto, and in count four with the crime of violation of Section 10851 of the Vehicle Code. These charges are made in the alternative, and in effect allege that the defendants committed an unlawful act which constitutes either the crime of grand theft auto or the crime of violation of Section 10851 of the Vehicle Code.

Therefore, if you should find a defendant guilty of one of those offenses, your verdict as to the other must be "not guilty". [47]

The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the person committing the act. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

For the purposes of the issues now on trial, you must presume that the defendant was sane at the time of his alleged conduct which, it is charged, constituted the crime described in the information. [48]

The mere fact that a person was in possession of stolen property soon after it was taken is not enough to justify his conviction of theft. It is, however, a circumstance to be considered in connection with

other evidence. To warrant a finding of guilty there must be proof of other circumstances tending of themselves to establish guilt.

In this connection you may consider the defendant's conduct, his false or contradictory statements, if any, and any other statements he may have made with reference to the property. If a person gives a false account of how he acquired possession of stolen property this is a circumstance that tends to show guilt. [49]

When one who was not at the place where a crime was committed at the time of its commission is later accused with having been present and having committed or taken part in committing such crime, his physical absence from the scene of the crime or his lack of participation therein, if proved, is a complete defense that we call an alibi.

The defendants in this case have introduced evidence tending to show that they did not participate in and were not present at the time and place of the commission of the alleged offense for which they are here on trial. If, after a consideration of all the evidence in this case, you have a reasonable doubt that the defendants were present at the time the crime was committed and that they participated in the alleged crime, they are entitled to an acquittal. [50]

The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts

are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction. [51]

In this case, you must decide separately the question of the innocence or guilt of each of the two defendants. If you cannot agree upon the innocence or guilt of both the defendants, but do agree as to the innocence or guilt of one of them, you must render a verdict as to the one upon whose innocence or guilt you do agree. [52]

Each count set forth in the information charges a separate and distinct offense. You must state your findings as to each count in a separate verdict. The defendants may be convicted or acquitted on any or all of the offenses charged. [53]

In arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment, as that is a matter which lies with the court and other governmental agencies, and must not in any way affect your decision as to the innocence or guilt of a defendant. [54]

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room. [55]



**Supreme Court of the United States**

**No. 336 -----, October Term, 19 70**

**Louis B. Nelson, Warden,**

**Petitioner,**

**v.**

**Joe J. B. O'Neill**

**ORDER ALLOWING CERTIORARI. Filed November 9, 1970.**

**The petition herein for a writ of certiorari**

**to the United States Court of Appeals for the Ninth**

**Circuit is granted.**

FILE COPY

FILED

JUN 30 1970

In the Supreme Court

JOHN F. DAVIS, CLERK

OF THE

United States

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OCTOBER TERM, 1969

No. 336

LOUIS S. NELSON, Warden, California State  
Prison at San Quentin,

*Petitioner,*

vs.

JOE J. B. O'NEIL,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI  
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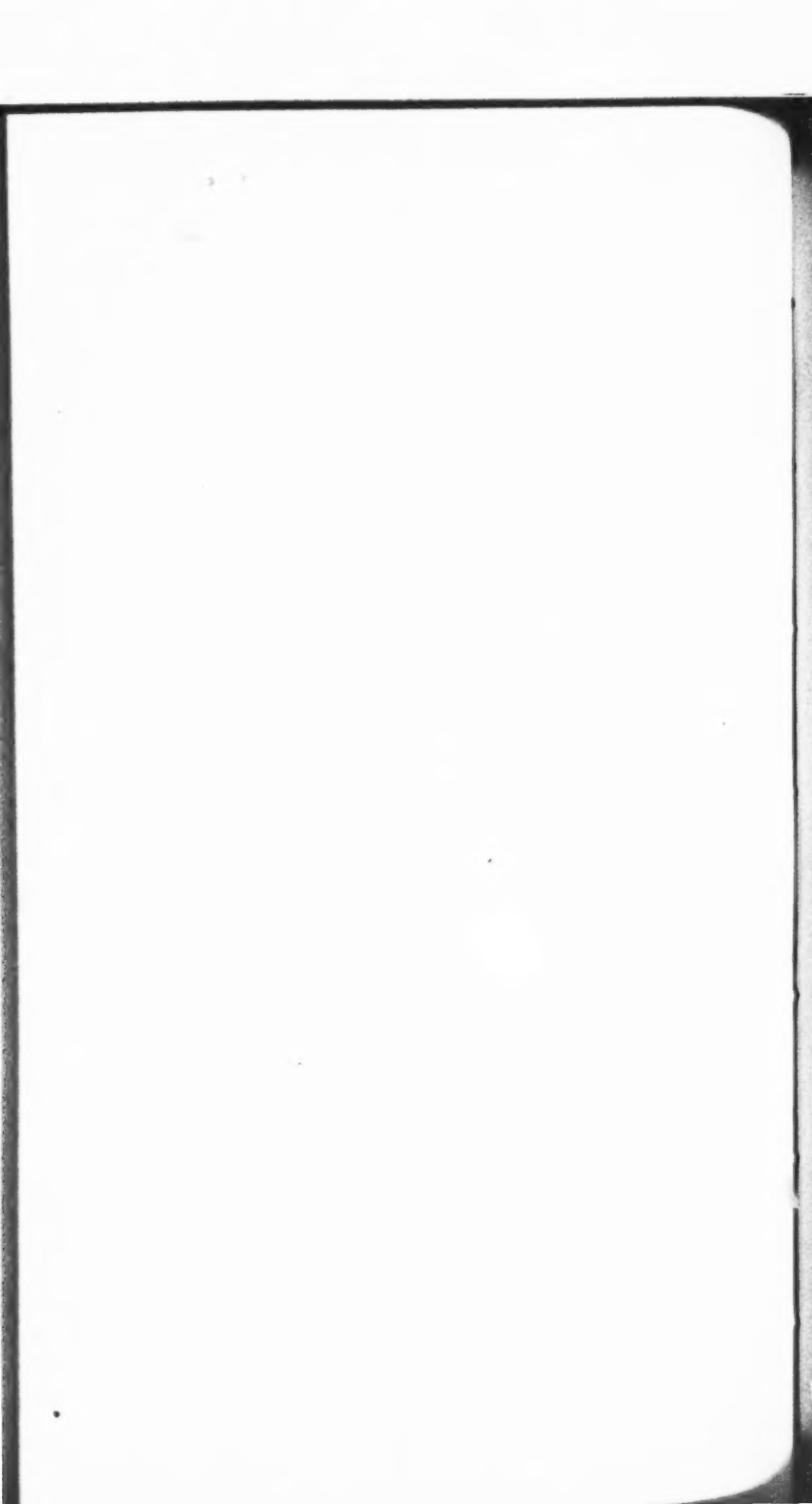
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# **In the Supreme Court**

## **OF THE United States**

**OCTOBER TERM, 1969**

**No.**

**LOUIS S. NELSON, Warden, California State  
Prison at San Quentin,**

*Petitioner,*

**vs.**

**JOE J. B. O'NEIL,**

*Respondent.*

### **PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit**

Petitioner, Louis S. Nelson, appellant below respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on January 26, 1970, affirming the Order of the United States District Court for the Northern District of California.

#### **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 422 F.2d 319 (1970), and is also appended hereto as

Appendix A. The opinion of the United States District Court for the Northern District of California is unreported and is appended hereto as Appendix B.

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### **JURISDICTION**

On January 26, 1970, the United States Court of Appeals for the Ninth Circuit affirmed the order of the United States District Court for the Northern District of California granting Joe J. B. O'Neil's petition for a writ of habeas corpus and ordering him released from state custody. A petition for rehearing was received one day late but was ordered filed by the court. The petition for rehearing was denied, with one judge dissenting, on April 23, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

---

### **QUESTIONS PRESENTED**

1. Whether *Bruton v. United States*, 391 U.S. 123 (1968), is violated when a confessing codefendant testifies on the stand, but denies making the statement implicating his codefendant.
2. Whether, under the circumstances of this case, admission of the codefendant's confession was harmful.
3. Whether the doctrine of comity between federal and state jurisdictions and the burden of habeas corpus petitions upon the federal judiciary oblige a federal district court to require a state prisoner to

exhaust state remedies made available by newly-announced constitutional standards.

---

### **STATUTE INVOLVED**

This case involves interpretation of Title 28, United State Code, Section 2254(b), which provides:

"An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an abuse of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

---

### **STATEMENT OF THE CASE**

#### **A. Proceedings in the State Courts**

Joe J. B. O'Neil, the petitioner for a writ of habeas corpus below and the respondent herein, was sentenced to state prison by the Los Angeles County Superior Court on July 17, 1965, after a jury had found him guilty of kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. He appealed to the California Court of Appeal, Second Appellate District, which affirmed his conviction in an opinion filed on March 30, 1967 (certified for non-publication). A petition for rehearing was denied on April 26, 1967. He did not file a petition for hearing with the California Supreme Court. An application to recall

the remittitur was denied by the California Court of Appeal on February 7, 1967.

O'Neil filed a petition for a writ of habeas corpus with the California Supreme Court on March 7, 1968, which was denied without opinion on March 20.

#### **B. Proceedings in the Federal Courts**

On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. An order to show cause was immediately issued and petitioner filed a return thereto on May 17, 1968. A supplemental return was filed on June 10, 1968, and a second supplemental return was filed on June 13.<sup>1</sup> O'Neil's traverse was filed on June 21, 1968.

On July 12, 1968, the District Court granted the writ and ordered O'Neil discharged from custody. It also provided that execution thereof was to be stayed ten days to permit filing of a notice of appeal and, in the event an appeal was taken, custody was not to be disturbed until further order of the court.

Petitioner's notice of appeal was filed on July 22, 1968, and a certificate of probable cause was issued the same day.

On January 26, 1970, a panel of the United States Court of Appeals, with one judge dissenting, affirmed

<sup>1</sup>The first supplement became necessary when this Court overruled *Delli Paoli* in *Bruton v. United States*, 391 U.S. 123 (1968), after we filed our return to the order to show cause. The second became necessary when, in *Roberts v. Russell*, 392 U.S. 293 (1968), this Court held the new *Bruton* rule fully retroactive.

the order of the District Court. A petition for rehearing, received one day late, was ordered filed but on April 23, 1970, the petition was denied with one judge dissenting.

---

### STATEMENT OF FACTS

On February 8, 1965, at approximately 10:30 p.m., Mr. Vance Collins was seated in his 1956 two-door, white Cadillac which was parked in the lot of a supermarket located at 3993 South Western Avenue in the City of Los Angeles. He was awaiting his wife's return from grocery shopping. (RT 10-12.)<sup>2</sup>

Respondent O'Neil approached the passenger door of the Collins' automobile, opened it, and got in. Respondent had a silver-plated gun and was pointing it at Mr. Collins. Respondent told him, "There is a fellow on your other side. Would you let him in?" The driver's side of the door was opened, and Mr. Collins leaned forward to let the second man in. The second man, respondent's codefendant Runnels, sat down in the rear seat. (RT 12-15.)

Respondent told Mr. Collins to back the car out of the lot. Mr. Collins, in fear, did as he was told. Respondent continued to give him directions. As the victim drove, respondent told him that he "might get hurt real bad" if he didn't have money. Respondent ordered Mr. Collins to hand over his wallet. Eight

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<sup>2</sup>As hereinafter used, "RT" refers to the reporter's transcript of respondent's state trial which was lodged with the District Court below.

dollars was taken, and Runnels returned the wallet to him. (RT 16, 18-20.)

Approximately three and one-half blocks from the market, respondent ordered the victim to stop and exit from the car. Respondent still had the gun pointed at him. Respondent ordered Mr. Collins to walk to the rear of the car and then to cross the street. Runnels got out of the back seat and stood beside the vehicle for some time. Runnels then got into the driver's seat and drove away with O'Neil. Mr. Collins returned to the market and notified the police. (RT 17, 22-24, 42-43, 60.)

Approximately 1:00 a.m., February 9, 1965, a police patrol unit received a radio message that a suspicious white automobile with two male Negro occupants was circling a liquor store. The officers drove to the liquor store and talked to the manager. The manager told the officers that the white vehicle was first pointed out to him by a customer. The manager then observed the vehicle circle the block two or three times. These circumstances caused the manager to become apprehensive and telephone the police. (RT 63, 67-68, 72, 89.)

At this point, one of the officers saw a white car with two male Negroes approaching in an alley near the liquor store. The vehicle was going slowly, and the manager said, "That is the vehicle". The automobile was a 1956 white Cadillac. (RT 69, 70, 75.)

Officers began following the Cadillac. O'Neil was the passenger and Runnels was the driver. During the

pursuit, O'Neil was observed to throw what appeared to be a shiny revolver from the car. Officers, with the red light and siren, stopped the suspects. On the basis of the radio call and the weapon, both occupants were taken into custody on suspicion of armed robbery when they alighted from the vehicle. Officers returned to the location where the object landed and retrieved a silver-plated .22 caliber revolver which was loaded with four bullets. (RT 63-66, 71, 75, 78-80.)

O'Neil and Runnels were taken to the Culver City Police station and the Cadillac was impounded. Approximately 4:00 p.m., February 9, 1965, they were formally arrested by Los Angeles Police officers and were taken to the University Police station. On the evening of February 9, 1965, Mr. Collins went to the University Police Station. He was told that the thieves may have been apprehended. Mr. Collins was asked to view a police lineup and he positively identified O'Neil and Runnels from the lineup. (RT 26-27, 34-35, 48, 80, 96.)

The next day, February 10, 1965, at approximately 10:20 a.m., Officer Traphagen had a conversation with Runnels. Runnels was advised that he did not have to say anything; that anything he said might be used in a later criminal prosecution; and that he had a right to an attorney. There was no coercion nor were there any promises of immunity. Runnels proceeded to make a complete confession implicating O'Neil. The court admitted the confession with an admonition to the jury that it was not to be considered against O'Neil. (RT 92-93, 102-05.)

**The Defense**

The mother and sister of O'Neil testified that he and Runnels came to the O'Neil home approximately 9:00 p.m. on February 8, 1965. They departed shortly after 11:00 of that same evening. The mother also testified that after her son's arrest, she was told by Mr. Collins that he was unsure of the identification. (RT 162-63, 167, 175-77.)

Mr. Lee Brooks testified that on February 8, 1965, at approximately midnight, he observed O'Neil and Runnels sitting in a big white car near 61st Street and Vermont Avenue in the City of Los Angeles. An unknown man approached the car and began conversing with them. The man handed what appeared to be keys to one of them. Runnels got into the driver's seat and drove off with O'Neil. (RT 145-47, 149-52, 157.)

Runnels testified that he was with O'Neil on the afternoon and evening of February 8, 1965. Runnels stated that he and O'Neil left the O'Neil household approximately 11:00 p.m. While sitting at a bus stop around midnight, they obtained a ride from a person known as "Gary". Gary was driving a white 1956 Cadillac. He drove them to a night club and went inside. They remained seated in Gary's automobile. Shortly thereafter, Gary returned to the car and began conversing with O'Neil. Approximately 12:20 a.m., February 9, 1965, Gary gave the keys to O'Neil. O'Neil was directed to bring the car back to the night club around 2:00 a.m. (RT 181, 185-89, 200, 207.)

Since O'Neil did not have a driver's license, Runnels drove. They headed for Santa Monica, but on

the way O'Neil discovered a gun in the glove compartment. They drove around the block and into an alley to find a place to throw the gun. O'Neil threw the gun out of the window. At this point, they were stopped and arrested by police. Runnels denied making any statement to police officers. (RT 189-92, 211, 213.)

Miss Mildred Manchester, the common law wife of Runnels, testified that she talked with Officer Trap-hagen on the morning of February 11, 1965. She was informed that the officer would see that Runnels got a life sentence if no statement was made as opposed to a lesser sentence if the statement was forthcoming. She was asked to see what could be done. Later that day, Miss Manchester received a telephone call from Runnels, and she relayed the officer's message. Runnels informed her that he was not going to make a statement. (RT 137-38, 140, 143.)

O'Neil testified that he spent the evening of February 8, 1965, in the company of Runnels. His version of the facts paralleled the story told by Runnels. In addition, O'Neil was able to identify "Gary" as James Garret. O'Neil admitted knowing the residence of Garret, but on cross-examination indicated that no attempt was made to subpoena him. (RT 217, 220, 238.)

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#### **REASONS FOR GRANTING THE WRIT**

There are several important reasons why this Court should grant the petition for certiorari. First, the decision of the Ninth Circuit herein is in direct conflict

with the decision of the Fifth Circuit in *Baker v. Wainwright*, 422 F.2d 145 (5th Cir. 1970), and review by this Court is necessary to resolve the issue. And second, petitioner believes that the Ninth Circuit has erroneously interpreted the confrontation rule set out in *Bruton v. United States*, 391 U.S. 123 (1968), and by misreading *Douglas v. Alabama*, 380 U.S. 415 (1965), contorted the right of confrontation beyond reason.

In addition, even assuming *Bruton* error during O'Neil's trial, the Court of Appeals erroneously concluded that it was harmful in view of the facts of this case.

Lastly, the District Court, in an action endorsed by the Ninth Circuit, refused to require a state prisoner to exhaust available state remedies before resorting to federal habeas corpus. This can only have the effect of damaging delicate federal-state relations and unduly burdening the federal judiciary.

---

## ARGUMENT

### I

#### THE WRIT SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS.

In the present case, O'Neil and Runnels were tried by the State of California for kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. The defendants had entered the victim's car parked in a super market parking lot, took his money at gunpoint, forced him to drive several blocks

and then forced him out and drove off with his car. Several days after the arrest, Runnels confessed, implicating O'Neil.<sup>3</sup> Both defendants took the stand and gave alibi testimony. On both direct and cross-examination, Runnels denied ever making the statement. The Ninth Circuit held:

"It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not 'affirm the statement as his'; he flatly denied making it. . . .

"The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all." *Id.* at 321 (App. A at iv-v).

In *Baker v. Wainwright*, 422 F.2d 145 (5th Cir. 1970), Baker and Damron had been tried by the State of Florida for robbery, kidnapping, and false imprisonment, and were convicted of robbery. Damron confessed to the robbery, claiming that Baker was the instigator. However, Damron took the stand and denied making the statement.

"As the Florida Court of Appeals held [*Baker v. State*, 217 So.2d 880, 885 (Fla.App. 1969)], Baker was not denied the right to be confronted with any witness against him. In *James v. United States*, 416 F.2d 467 (5th Cir. 1969) this court upheld the conviction of a non-confessing joint defendant over a *Bruton* objection in a joint trial

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<sup>3</sup>The Court of Appeals observed that Runnels' confession gave credit to O'Neil as the mastermind of the crime, *O'Neil v. Nelson*, 422 F.2d 319, 320 (9th Cir. 1970) (App. A at ii), an assessment with which petitioner disagrees. But even if this were a proper analysis, then *O'Neil* is even closer to *Baker v. Wainwright*, discussed *infra*.

where the confessing defendant took the stand and was subject to cross-examination. . . . Baker's right under the Sixth Amendment to be confronted with the witnesses against him was in no way denied in the case at bar because Damron took the stand and made himself subject to cross-examination by Baker. Indeed as the Attorney General of Florida contends, the most skillful cross-examiner could not have produced a better result for Baker than Damron's testimony that his entire confession had never been made and that neither he nor Baker robbed Infinger." *Id.* at 147-48 (footnotes omitted).

*O'Neil* and *Baker* are on all fours, both on their facts and the principles of law applicable thereto, but they reach directly opposite results. Therefore, this petition should be granted to resolve the issue of law presented by these cases.

---

## II

### THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IS SATISFIED IF THERE IS AN OPPORTUNITY TO CROSS-EXAMINE.

Citing *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, 391 U.S. 123 (1968), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), the majority opinion below concludes that *O'Neil* was denied the right of confrontation because Runnels denied making a confession and thereby precluded effective cross-examination. *O'Neil v. Nelson*, *supra*, at 321 (App. A at iii-v). In so doing, the majority miscon-

strues *Douglas*, misinterprets *Bruton*, and both misconceives and fails to examine the options available under the right of confrontation.

As the Sixth Circuit did in *Townsend v. Henderson*, *supra*, at 329, the majority seizes upon fortuitous language found in *Douglas*, and quoted in *Bruton*, for the proposition that only if the confessing codefendant admits making the statement (here, Runnels denied making it) can the accused have effective cross-examination, *O'Neil v. Nelson*, *supra*, at 321 (App. B at iv):

“[E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his. Loyd did not do so but relied on his privilege to refuse to answer.” *Douglas v. Alabama*, *supra*, at 420, quoted in *Bruton v. United States*, *supra*, at 127.

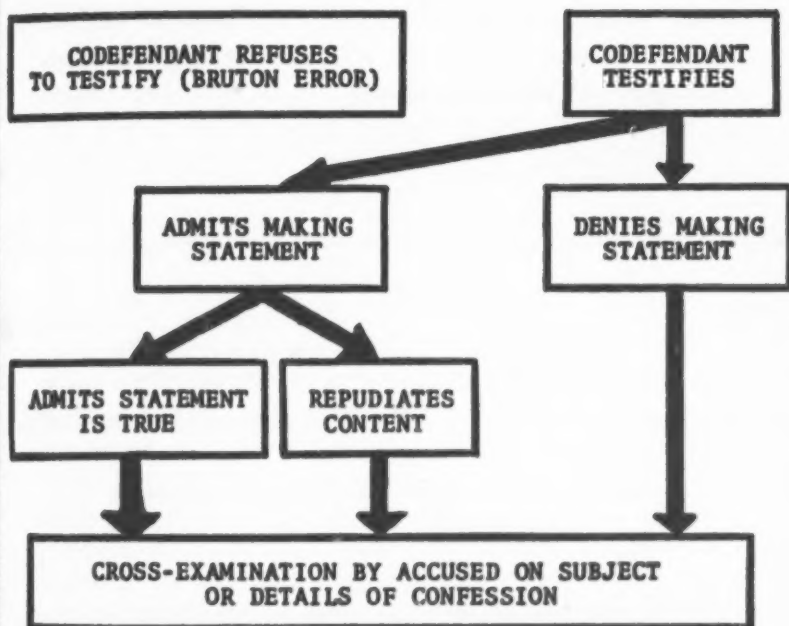
Yet when this Court in *Douglas* noted that “effective confrontation of Loyd was possible only if Loyd affirmed the statement as his,” the Court was merely stating that cross-examination was impossible where a codefendant stood fast on his right against self-incrimination. Obviously, as long as Loyd invoked his fifth amendment right, he could not be cross-examined, whereas if he waived that right and testified, then he could be fully cross-examined. That this is indeed the proper interpretation of *Douglas* is suggested by *California v. Green*, ..... U.S. ...., ..... 30 U.S. Sup. Ct. Bull. B2329, B2341-42 (June 23, 1970), in which this Court stated:

“[I]n *Douglas v. Alabama*, . . . the defendant's supposed accomplice, Loyd, . . . refused to testify

on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement; had such cross-examination taken place, the opinion strongly suggests that the confrontation problem would have been nonexistent."

The language from *Douglas* was quoted in *Bruton* because the same conflict between fifth and sixth amendment rights was involved. As this Court noted in *Green*, "[N]o confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant." *California v. Green, supra*, ..... U.S. at ....., 30 U.S.Sup.Ct. Bull. at B2342 (footnote omitted).

Neither *Douglas* nor *Bruton* stands for the proposition that if the codefendant takes the stand, but denies rather than admits making the statement, an accused is deprived of an opportunity to subject his codefendant to effective cross-examination. This becomes patently clear when the options available to the accused are examined. As illustrated in Figure A, below, there are only a few possible avenues of cross-examination available when the confession of a co-defendant is introduced at trial.

**Figure A****OPTIONS AVAILABLE TO CROSS-EXAMINE  
CONFESSING CODEFENDANT**

If the codefendant does not take the stand (*Bru-ton*), or if he is called but refuses to testify (*Douglas*) then the accused cannot cross-examine him. However, if the codefendant testifies, he either admits or denies making the statement. If he admits making the state-ment, he either admits that the statement is true or repudiates its content and testifies that the statement

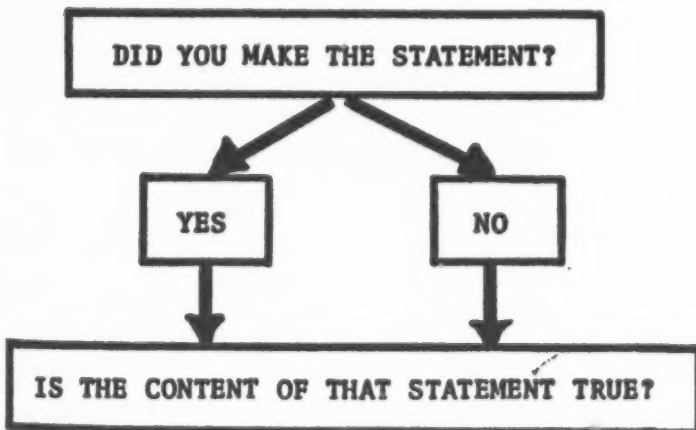
is false. But if the codefendant testifies, regardless of whether he admits or denies making the statement, he is always subject to cross-examination by the accused upon the subject or details of the confession. Whether the codefendant admits or denies making the statement, insofar as the accused's right of confrontation is concerned, the result is always the same. This is, in fact, suggested by the *Douglas* opinion:

"In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right to cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to him but not admitted [or denied] by him. Nor was the opportunity to cross-examine the law enforcement officers adequate. . . . [S]ince their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself." *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965), partially quoted in *Bruton v. United States*, 391 U.S. 123, 127 (1968).

The defect in *Douglas* arose because Loyd's invocation of his right against self-incrimination precluded his cross-examination, and therefore Douglas could not cross-examine him as to whether "the statement had been made and that it was true." See also *Bruton v. United States*, 391 U.S. 123, 127 (1968). Even if the police officers could be examined as to whether the statement had been made, Loyd could still not be cross-examined "to test the truth of the statement itself. Thus *Douglas* demonstrates that, as illustrated by Figure B, there are only two possible questions that can be asked of a codefendant on cross-examination:

**Figure B**

**CROSS-EXAMINATION OF CODEFENDANT**



It is obvious that the availability of cross-examination into the substance of the statement does not depend upon whether the codefendant admits making the statement, for even if he does not, the accused may still inquire into the facts contained in the purported confession. The only consequence of the codefendant's denial as to making the statement is to convert a confession into an accusation. The availability and scope of inquiry remains the same.

That this type of cross-examination was possible in this case need not be subject of speculation, for such cross-examination was actually had, albeit by the prosecution and counsel for Runnels. For example, the prosecutor inquired as to whether Runnels had made the statement at all:

"Q. Now, do you remember talking to Officer Traphagen?

A. Remember talking to him?

Q. Yes, about this case?

A. Ain't talked to him about no case, no.

Q. Didn't you ever talk to him about the case?

A. No, I didn't talk to him about the case.

Q. Did he talk to you about the case?

A. Yeah, he talked to me about it.

Q. Did he ask you any questions about your whereabouts that night?

A. Yes, he asked me.

Q. Did he ask you whether or not you had robbed this man, Mr. Collins?

A. Yes, he asked me that.

Q. Did he ask you whether or not you had taken his car?

A. He asked me that.

Q. Did he ask you what you were doing down in Culver City.

A. Yes.

Q. Did you tell him that you had met O'Neil earlier that night and talked about committing some robberies?

A. I didn't tell him anything. I told him I had no comment to make.

Q. Didn't you tell him that you went down to the Better Food Market?

A. Well, after he told me whatever I said would be held against me, and I could wait to talk to a lawyer, I decided I would wait to talk to a lawyer, and I didn't make no statement.

Q. None whatsoever?

A. That's right." (RT 210:9-211:16.)

"Q. Didn't you tell Officer Traphagen you went into the liquor store?

A. I told you I made no statement to Mr. Traphagen.

Q. You refused to talk to him?

A. That's right.

Q. Everything Officer Traphagen said you told him, he is either mistaken or lying?

A. One of the two he is doing." (RT 213:4-12.)

On direct examination, Runnels denied making the statement. (RT 192:12-18.) He also denied its substance.

"Q. Have you committed this robbery?

A. No." (RT 192:10-11.)

*Douglas* requires that the accused be afforded an opportunity to cross-examine the confessing codefendant as to (1) whether he made the statement, and (2) the content of the statement. Such inquiry was made

by both Runnels' attorney and the prosecution, and is similar to that found to remove any possibility of *Bruton* error in *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968). There is, as suggested in another case, no reason why O'Neil could not have done so too. See *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968). As the dissenting opinion states, *O'Neil v. Nelson, supra* at 325 (App. A at xv):

"In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes."

The Fifth Circuit made the same observation: that the confessing codefendant gives the defendant the maximum benefit of cross-examination when he denies making the statement. *Baker v. Wainwright*, 422 F.2d 145, 148 (5th Cir. 1970). And in *California v. Green, supra*, ..... U.S. at ....., 30 U.S. Sup. Ct. Bull. at B2338, this Court suggested almost the same conclusion:

"The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant."

It is obvious from *Bruton v. United States*, 391 U.S. 123, 128, 132, 136 (1968), and *Harrington v. Cal-*

ifornia, 395 U.S. 250, 252-53 (1969), that if the accused is given the *opportunity* to cross-examine, the sixth amendment right of confrontation has been satisfied. This seems to be the view of the various other courts of appeals.<sup>4</sup> Even four other panels of the Ninth Circuit have suggested as much.<sup>5</sup> It is the central holding of *California v. Green*, ..... U.S. ...., 30 U.S. Sup. Ct. Bull. B2329, B2337 (June 23, 1970). Mr. Justice Harlan, concurring in *Green*, gave "availability" special emphasis. *Id.*, ..... U.S. at ....., 30 U.S. Sup. Ct. Bull. at B2357, B2360-61. Insofar as the majority opinion below holds that O'Neil was denied the right of confrontation, it is wrong.

### III

#### ANY POSSIBLE ERROR IN ADMITTING RUNNELS' CONFESSION WAS HARMLESS.

There are two reasons why any difficulty in cross-examining Runnels, arising because he denied making the statement, was harmless. The first of these is that the type of situation arising in O'Neil's case does not even give rise to error of constitutional dimension. As long as the declarant (here Runnels) is available

<sup>4</sup>*United States v. Insana*, 423 F.2d 1165, 1168 (2d Cir. 1970); see *McHenry v. United States*, 420 F.2d 927, 928 (10th Cir. 1970); *United States v. Cole*, 418 F.2d 897, 899 (6th Cir. 1969); *United States v. Weston*, 417 F.2d 181, 187 (4th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *United States v. Hoffa*, 402 F.2d 380, 387 (7th Cir. 1968), vacated on other grounds sub nom. *Giordano v. United States*, 394 U.S. 310 (1969).

<sup>5</sup>*Ignacio v. Guam*, 413 F.2d 513, 515 (9th Cir. 1969); *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968); *Rios-Ramirez v. United States*, 403 F.2d 1016, 1017 (9th Cir. 1968); *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968).

for cross-examination, then even the use of his statement as substantive evidence against his codefendant is not constitutional error. *California v. Green*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 30 U.S. Sup. Ct. Bull. B2329, B2332-37, B2343 (June 23, 1970). O'Neil got even better than that, for the evidence was admitted only against Runnels. (RT 102.)

Secondly, under *Harrington v. California*, 395 U.S. 250 (1969), *Bruton* error may be considered harmless where the evidence presented by the prosecution was overwhelming. Even if the disavowal of his confession by petitioner's codefendant and petitioner's failure to cross-examine his codefendant were considered *Bruton* error, since the evidence was overwhelming, and the confessions did not have a devastating impact upon petitioner's defense, any error was harmless.

*Bruton* error is "harmful" error only if the codefendant's confession has a devastating impact upon the non-confessing defendant's defense. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court observed that under some circumstances a jury could be expected to follow limiting instructions, while in others:

"[1] the risk that the jury will not, or cannot, follow instructions is so great, and [2] the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

In *Bruton*, if the Evans confession were excluded, Bruton's involvement in the crime rested solely upon the testimony of a single witness whose identification

could not be supported through the testimony of the only other eyewitness. Since neither defendant offered a defense, the Evans confession obviously had a "vital" impact upon the case. The necessity of a vital impact before *Bruton* error can be held harmful has also been suggested by several courts which have applied the rule.<sup>6</sup>

In *Harrington v. California*, 395 U.S. 250, 254 (1969), the *Bruton* error was found harmless because "the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt. . . ." This Court therein noted that one of the confessing codefendants who implicated Harrington testified and was cross-examined. *Id.* at 253. Other witnesses "testified he had a gun and was an active participant." *Ibid.* Furthermore, "the case against Harrington was not woven from circumstantial evidence." *Id.* at 254. Even though the implicating confessions of two codefendants who did not testify were erroneously admitted, "apart from them the case against Harrington was . . . overwhelming. . . ." *Ibid.* (Emphasis added.) This Court thus held that *Bruton* error was harmless if overwhelming evidence apart from that erroneous under *Bruton* had been offered at trial.

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<sup>6</sup>Cases finding no "vital impact" include: *Wapnick v. United States*, 406 F.2d 741, 742-43 (2d Cir. 1969); *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968); see *Santoro v. United States*, 402 F.2d 920, 923 (9th Cir. 1968). Cases finding a "devastating effect" include: *United States ex rel. LaBelle v. Mancusi*, 404 F.2d 690 (2d Cir. 1968); *United States v. Jones*, 402 F.2d 851 (2d Cir. 1968).

The majority below concluded that Runnels' confession was "harmful" to the defense because "some doubt was raised about the victim's identifications," "the alibi witnesses stuck to their stories," and "the remarkable agreement between Runnel's [sic] out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery." *O'Neil v. Nelson*, 422 F.2d 319, 322-23 (9th Cir. 1970). (App. A at viii.) The appropriate inquiry, however, is not whether the confession may have had any effect upon the trial, but whether it had a "devastating impact" upon the defense because of its content, the nature of the defense, and the state of the prosecution's evidence absent that confession.

Under the facts of this case, the Runnels confession could not have had any effect upon O'Neil's defense for a number of reasons:

(1) Absent Runnels' confession, the evidence was overwhelming. The victim, a percipient witness, positively identified O'Neil and Runnels as the two men who robbed him and stole his car, threatening him with a silver-plated pistol. O'Neil and Runnels were found driving the victim's car, and O'Neil was seen throwing a silver-plated pistol away.

(2) The confession did not have a devastating impact upon O'Neil's defense since:

(a) It was merely descriptive, and did not attempt to shift the blame to O'Neil. Compare

*United States ex rel. LaBelle v. Mancusi*, 404 F.2d 690 (2d Cir. 1968).<sup>7</sup>

(b) O'Neil had the opportunity to cross-examine Runnels, but declined to do so. *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968).

(c) Runnels actually took the stand, denying having confessed and repudiating the contents of the confession by testimony contrary thereto. *Baker v. Wainwright*, 422 F.2d 145, n. 9 at 148 and accompanying text (5th Cir. 1970).

(d) Runnels' testimony at trial fully supported O'Neil's defense.

Insofar as the majority opinion concludes that any error was "harmful," it is erroneous.

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#### IV

#### FAILURE TO ADHERE TO THE EXHAUSTION DOCTRINE UNDERMINES FEDERAL-STATE RELATIONSHIPS AND UN-DULY BURDENS FEDERAL COURTS.

As the majority opinion notes, *O'Neil v. Nelson*, 422 F.2d 323 (9th Cir. 1970) (App. A at ix), "the *Bruton* question was never presented to the state

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<sup>7</sup>The majority opinion states, "Runnels' purported statement . . . gives considerable credit to O'Neil for masterminding and directing the day's work." *O'Neil v. Nelson*, *supra*, 422 F.2d at 320. (App. A at ii.) The only support for such a conclusion to be found in Runnels' confession is where he states, "O'Neil asked him if he wanted to make a couple of hits," and "O'Neil had the gun . . . [and] went up to the driver . . . ." (RT 103.) In every other case, Runnels said "they" did this or that. The quoted passages can hardly be characterized as crediting O'Neil with "masterminding and directing."

courts for the very good reason that *Bruton* had not been decided when O'Neil filed his federal petition." Under previous decisions of the Ninth Circuit, a federal habeas petitioner was required to exhaust state remedies made available by the announcement of new constitutional standards before he could apply to the federal courts for relief. *Ashley v. California*, 397 F.2d 270, 271 (9th Cir. 1968); *United States ex rel. Walker v. Fogliani*, 343 F.2d 43, 46-48 (9th Cir. 1965); *Blair v. California*, 340 F.2d 741, 744 (9th Cir. 1965).

Some court must assess the "*Bruton* error" in light of the trial record, and determine whether in view of the evidence at trial, and the nature and content of the confession, the admission of the confession was harmless. This task should initially be left to the state courts, which have shown their willingness to examine *Bruton* claims, see, e.g., *In re Whitehorn*, 1 Cal.3d 504, 506, 509, 82 Cal.Rptr. 609, 611-12 (1969), both in the interests of comity and to reduce the burdens upon the federal courts; these being the purposes of Title 28 United States Code, section 2254(b). As this Court only recently noted in *California v. Green*, ..... U.S. ...., ....., 30 U.S. Sup. Ct. Bull. B2329, B2349 (June 23, 1970), a harmless-error question is more appropriately resolved by the state court in the first instance. Insofar as the majority below concludes that it was proper for the district court to pass upon the *Bruton* claim without referring the petitioner to the state courts, the majority opinion errs.

**CONCLUSION**

As a result of the majority opinion below, the sixth amendment right of confrontation has been contorted beyond recognition, the *Bruton* rule carried past the pale of logic, and *Harrington* has suffered serious erosion. Furthermore, delicate federal-state relations are subjected to unnecessary strain while the federal judiciary shoulders an even greater share of the burden of collateral review. For these reasons, we respectfully urge that this petition for a writ of certiorari be granted.

Dated, San Francisco, California,  
June 29, 1970.

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**(Appendices Follow)**

## Appendix A

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### United States Court of Appeals For the Ninth Circuit

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Joe J. B. O'Neil,	} No. 23,149
vs.	
Louis S. Nelson, Warden, Defendant-appellant.	

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[January 26, 1970]

Appeal from the United States District Court  
for the Northern District of California

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Before: Browning and Duniway, Circuit Judges,  
and Solomon.\* District Judge

Duniway, Circuit Judge:

O'Neil is a California prisoner, convicted on two counts under the California Penal Code, kidnapping for purposes of robbery (§ 209) and robbery in the first degree (§ 211), and vehicle theft (Cal. Veh. Code § 10851). On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court, which granted the writ. The warden appeals (28 U.S.C. § 2253).

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\*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

### 1. *The facts.*

The District Judge made his ruling on the basis of the record of the California trial. This is what that record shows. O'Neil was tried with his alleged partner in the crimes, Roosevelt Runnels. The prosecution presented three witnesses, the victim and two policemen. The victim testified that while he was waiting for his wife in a grocery store parking lot the defendants entered his car at gunpoint. They took about eight dollars from his wallet, forced him to drive several blocks from the market and get out of his car, and then drove away.

One of the policemen testified that later the same evening he had responded to a call from a liquor store operator who was suspicious of a white Cadillac circling the block outside his store. When the squad car followed the Cadillac, one of its occupants threw a gun out of the window. The police stopped the car and arrested its occupants. The car belonged to the victim; its occupants were the defendants.

The other policeman testified (over objection) to a statement made to him by O'Neil's co-defendant Runnels two days after the arrest. Runnels' purported statement coincides almost exactly with the victim's story so far as they overlap, but gives considerable credit to O'Neil for masterminding and directing the day's work. Runnels is alleged to have said that O'Neil came to his place in the afternoon before the robbery and asked him if he wanted "to make a couple of hits," and that after the occurrence in question they decided to drive over to rob the liquor store, and were

circling outside waiting for the customers to leave when they were arrested.

Both defendants relied almost entirely on an alibi. Each took the stand and testified that they had been at O'Neil's house at the time of the robbery, and that they had been given the car to drive an acquaintance without warning that it did not belong to him. Several defense witnesses corroborated parts of the story. Runnels flatly denied having made the statement to the policeman, both on direct and cross-examination.

O'Neil's counsel did not cross-examine Runnels. He was trying to establish the same alibi to which Runnels was testifying and obviously did not want to ask about the veracity of an out-of-court statement that both he and Runnels wished to convince the jury had never been made. The efforts of the prosecutor to trip up Runnels were to no avail; he flatly and consistently denied having made the statement. Presumably, if O'Neil's counsel had cross-examined on the subject, the result would have been the same.

Before the officer testified about the statement of Runnels, the court instructed the jury as follows:

"Before you relate the conversation, I will instruct the jury that this statement is to be received and considered by the jury only as to the Defendant Runnels, the one who was making the statement, and is not to be considered by the jury in any manner as against his co-defendant, Defendant O'Neil."

## 2. *Violation of the Bruton rule.*

At the close of the prosecutor's case, there was presented the exact situation that was condemned by the

Supreme Court in *Bruton v. United States*, 1968, 391 U.S. 123, made fully retroactive in *Roberts v. Russell*, 1968, 392 U.S. 293. The warden argues, however, that the *Bruton* error was cured because Runnels took the stand and so was available for cross-examination by counsel for O'Neil. Thus there was an opportunity to confront and cross-examine Runnels, lack of which is the basis for the *Bruton* decision. See *Parker v. United States*, 9 Cir., 1968, 404 F.2d 1193.

We think that in this case the error was not cured. The Court in *Bruton* relied heavily on its earlier opinion in *Douglas v. Alabama*, 1965, 380 U.S. 415. It is significant to note the use made of that case in *Bruton*. In *Douglas*, the statement of a convicted comrade in the crime (Loyd) was introduced to "refresh the memory" of Loyd when the state called him to the stand. It was presented in questions, piece by piece, over strong objection and despite Loyd's absolute refusal to testify. In *Bruton* this near-misconduct (or dereliction of judicial duty) aspect of the case was not relied upon and the Court said:

"We noted [in *Douglas*] that 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. . . .'"

It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not "affirm the statement as his"; he flatly denied making it. Under these circumstances, while the statement was admissible against Runnels, both

as an admission or confession and for impeachment, it never became admissible against O'Neil. Yet it remained in the record, and *Bruton* tells us that the court's instruction to the jury is, as a matter of law, ineffective.

The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all.

The only circuit that has squarely faced the question presented by this case is the Sixth. In *Townsend v. Henderson*, 6 Cir., 1968, 405 F.2d 324, a co-defendant's confession was admitted in a trial for jailbreaking. In reversing denial of habeas corpus, the court said:

"The only possible distinction between the present case and *Bruton* is that in *Bruton* the co-defendant did not take the witness stand, whereas here Terry did testify in his own behalf. But, this distinction is unimportant since, although Terry was called as a witness, he denied making the confession. Townsend therefore had no effective right of cross-examination in regard to the confession. A similar question was presented in *Douglas v. Alabama*, 380 U.S. 415 . . . (1965), and it was there held 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his.'" (405 F.2d at 329)

See also *West v. Henderson*, 6 Cir., 1969, 409 F.2d 95.

A number of circuits, including this one, have considered the application of *Bruton* in cases in which a co-defendant has taken the stand after the introduction of his out-of-court statement. But the cases that

have rejected challenges under the *Bruton* rule have been careful to emphasize that effective cross-examination was possible, and usually, that it actually occurred.

In *Santoro v. United States*, 9 Cir., 1968, 402 F.2d 920, the three co-defendants whose out-of-court statements were introduced took the stand and were examined and cross-examined at length:

“Thus, appellant’s three codefendants took the stand and each testified regarding the subject of his or her out-of-court statements which implicated appellant. On this ground we distinguish *Bruton*. . . .” (402 F.2d 922.)

In *Rios-Ramirez v. United States*, 9 Cir., 1969, 403 F.2d 1016, cert. denied, 394 U.S. 951, we said:

“As in *Santoro*, and contrary to the case in *Bruton*, defendant Manzano in the present case took the stand and testified regarding the subject of her out-of-court statements. Much of her direct testimony concerned appellant Rios-Ramirez.”

. . . .

“Thus, appellant not only had an opportunity to confront the person whose statements inculcated him, but he in fact took advantage of this opportunity . . . .” (1017)

In *Ignacio v. Guam*, 9 Cir., 1969, 413 F.2d 513, we summarized our holdings in *Santoro* and *Rios-Ramirez*:

“In both *Rios-Ramirez* and *Santoro* we found the rule of *Bruton* inapplicable because the co-defendants whose out-of-court statements were used to incriminate petitioners Rios-Ramirez and San-

toro all took the stand and testified regarding the subject of their extrajudicial declarations." (515)

*Ignacio*, however was decided on harmless error grounds.

*Parker v. United States*, 9 Cir., 1968, 404 F.2d 1193, is not to the contrary. There we pointed out that "[j]oint trials of persons charged together with committing the same offense or with being accessory to its commission are the rule, rather than the exception. There is a substantial public interest in this procedure. . . ." (1196) In rejecting the *Bruton* argument we said:

"[S]ome of the facts mentioned in the out-of-court statements . . . were also proved by direct testimony. Others were merely small bits and pieces of a larger picture and can hardly have had any substantial effect upon the verdict. Finally, Orlando took the stand and was subject to cross-examination." (citing *Santoro* and *Rios-Ramirez*.)

We also rejected Parker's argument that he had no right to cross-examine his co-defendant. Most of the evidence about which Parker was complaining came from the mouths of the co-defendants on the witness stand. That which came from the recital by F.B.I. agents of out of court statements was of minor importance. In essence, *Parker* is a harmless error case.

In *United States v. Elliott*, 9 Cir., 1969, \_\_\_\_\_ F.2d \_\_\_, (Nos. 23,646 and 23,647, decided October 31, 1969), there was no out-of-court statement. The defendant was objecting to the direct testimony of a partner in

crime. Again we emphasized the adequacy of the cross-examination:

"In this case Henne appeared in court, testified, and was subjected to extensive cross-examination by Elliott's counsel; thus, there was full confrontation."

Other circuits, in rejecting challenges under *Bruton*, have been careful to distinguish the situations before them from the situation in this case. See, e.g., *United States v. Ballentine*, 2 Cir., 1969, 410 F.2d 375; *United States v. Jackson*, 6 Cir., 1969, 409 F.2d 8; *United States v. Lipowitz*, 3 Cir., 1969, 407 F.2d 597; *Lewis v. Yeager*, 3 Cir., 1969, 411 F.2d 414.

### 3. *Harmless error.*

The warden urges that if the *Bruton* rule was violated, the error was harmless beyond a reasonable doubt. *Chapman v. California*, 1967, 386 U.S. 18. We think not.

Although the alibi may seem incredible (the jury certainly did not believe it), and the victim positively identified the defendants in court, we cannot say that the admission of Runnels' statement did not harm O'Neil beyond a reasonable doubt. Some doubt was raised about the victim's identifications, and the alibi witnesses stuck by their stories. The remarkable agreement between Runnels' out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery. It seems to us more likely than not that Run-

nels' statement dispelled the doubts of the jury. *Harrington v. California*, 1969, 395 U.S. 250 does not persuade us that the error here was harmless. The state's case here was not overwhelming in the sense that the state's case was overwhelming in *Harrington*.

#### 4. *Exhaustion of state remedies.*

The warden argues that O'Neill has not exhausted his state remedies. The *Bruton* question was never presented to the state courts for the very good reason that *Bruton* had not been decided when O'Neil filed his federal petition. See *Ashley v. California*, 9 Cir., 1968, 397 F.2d 270; *United States ex rel. Walker v. Fogliani*, 9 Cir., 1965, 343 F.2d 43; *Blair v. California*, 9 Cir., 1965, 340 F.2d 741. See also *United States ex rel. Heirens v. Pate*, 7 Cir., 1967, 401 F.2d 147; *United States ex rel. De Lucia v. McMann*, 2 Cir. 1967, 373 F.2d 759; *United States ex rel. Martin v. McMann*, 2 Cir., 1965, 348 F.2d 896 (*in banc*). Cf. *United States ex rel. Bagley v. LaVallee*, 2 Cir., 1954, 332 F.2d 890.

On the other hand, the doctrine of exhaustion of state remedies, as codified in 28 U.S.C. § 2254, is based on comity, not jurisdiction. See *Bowen v. Johnston*, 1939, 306 U.S. 19, 27; *Hunt v. Warden*, 4 Cir., 1964, 335 F.2d 936, 940. Cf. *Wilson v. Anderson*, 9 Cir., 1967, 379 F.2d 330, *rev'd*, 330 U.S. 523 (1968). As we said in *Walker*, 343 F.2d at 47:

"There is no doubt as to whether or not the District Court had the power to entertain the petition for writ of habeas corpus. It had the power, a power which has been vested in the Federal Dis-

trict Courts since the Act of February 5, 1867 c. 28, § 1, 14 Stat. 385-386) extended the Federal writ to state prisoners and perhaps before. *Townsend v. Sain*, 1963, 372 U.S. 293. . . . The question is one as to how the power should be appropriately exercised."

When O'Neil filed his federal petition he had exhausted his then state remedies. No evidentiary hearing was held; none was or is required. *Bruton* gave him a "new" ground. It is a state ground as well as a federal one, because the state courts are bound by decisions of the United States Supreme Court construing the Constitution of the United States. The "facts," i.e., the contents of the state record, are not disputed. The only question is one of law and federal law at that. The record shows that O'Neil did present the question, (but obviously could not cite *Bruton* or *Roberts v. Russell*, both *supra*) to the California courts. He relied on a decision of the California courts, *People v. Aranda*, 1965, 63 Cal.2d 518, which anticipated *Bruton*. The California Supreme Court has held, however, in *People v. Charles*, 1967, 66 Cal.2d 330, that *People v. Aranda* was not retroactive, that it did not apply to decisions that were then final. This is contrary to the *Roberts* rule of the Supreme Court, as applied to *Bruton*. But the *People v. Charles* holding did not affect O'Neil, because the affirmance of his conviction occurred only five days before *People v. Charles* was decided. His conviction was not final; he could and did apply for a rehearing, which was denied. He then sought habeas corpus in the California Supreme Court, which was also denied. Thus

substantially the same question that he now presents was presented to and decided by the California court, California having anticipated *Bruton*. We can find here no benefit to California's administration of justice, no amelioration of state-federal relationships, in requiring that O'Neil again wend his way through California's courts. Federal law requires the decision that the District Judge made. Under the peculiar facts of this case, we agree with the District Judge that O'Neil has done enough so that he can be fairly said to have exhausted his state remedies. We here exercise our discretion to sustain that ruling.

We think that the matter is controlled by *Roberts v. LaVallee*, 1967, 389 U.S. 40, and by our decision in *Pope v. Harper*, 1969, 407 F.2d 1303. As we there pointed out, *Roberts v. LaVallee* has destroyed whatever support the warden might find in *Blair, supra*. In *Ashley and Walker, supra*, there was fact finding to be done, and we thought it appropriate that the state courts be given the opportunity to find the facts.

Affirmed.

Solomon, Dissenting:

We may be nearing the day when a co-defendant's confession in a joint trial will be barred, but I do not believe *Bruton v. United States*, 391 U.S. 123 (1968), or any other case cited by the majority goes that far.

Here, a police officer testified that after the arrest of Runnels, a co-defendant, Runnels confessed that on the day of the crimes O'Neil asked him if he

wanted "to make a couple of hits." According to the officer, Runnels said that the two of them entered the victim's car and at gunpoint took the victim's money. They forced the victim to drive several blocks and get out of his car. They then drove away in the victim's car. In his defense, Runnels took the stand and denied making the confession. He testified that he and O'Neil did not commit the crimes and that they were at O'Neil's house at the time. O'Neil also took the stand, and he too testified that they were at his house at the time of the crimes. Two other defense witnesses corroborated this testimony.

In *Bruton*, the Government introduced co-defendant Evans' confession, but Evans refused to testify. The Supreme Court set aside Bruton's conviction because Evans' refusal to take the stand "posed a substantial threat to [Bruton's] right to confront the witnesses against him" and denied Bruton a fair trial. 391 U.S. at 137.

According to the majority here, the State's introduction of Runnels' confession created a *Bruton* situation which was not cured by Runnels' subsequent testimony because Runnels refused to acknowledge the confession as his.

The majority believes that *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton* require a confession to be excluded whenever the co-defendant denies that he made it. In *Douglas*, the defendant was convicted in a separate trial, of assault with intent to murder. At the trial, the prosecutor asked leading questions to tell

the jury about a confession of Loyd, an accomplice. According to the confession, Douglas shot the victim. Loyd refused to testify.

The Supreme Court reversed Douglas' conviction because Douglas could not cross-examine Loyd "to test the truth of the statement itself," 380 U.S. at 420, and held that Douglas was unfairly prejudiced by his inability to cross-examine Loyd.

The Supreme Court also stated that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his." 380 U.S. at 420. Relying on this statement, the majority here holds that O'Neil's conviction must be reversed because Runnels did not affirm the confession as his.

I do not believe *Bruton* and *Douglas* require exclusion of the confession here. In each case, the co-defendant refused to testify, and he therefore could not be cross-examined. Here, Runnels testified, and his testimony was subject to cross-examination. O'Neil elected not to cross-examine Runnels because Runnels supported O'Neil's alibi when he testified that O'Neil was with him at O'Neil's house at the time of the crimes.

The majority also cites *West v. Henderson*, 409 F.2d 95 (6th Cir. 1969), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), in support of its position.

In *West*, the defendant and two others were tried for first degree murder in Tennessee, where the jury fixes the punishment and has the power to impose a

death sentence. The prosecutor introduced the statement of one of the co-defendants, who denied making the statement. According to the Sixth Circuit, this statement, which the prosecutor called a "confession," was "a studied effort on the part of [the co-defendant] to exculpate himself and to inculcate [the defendant]." 409 F.2d at 97. The Court held that introduction of the confession was fundamentally unfair to the defendant and reversed his conviction.

In *Townsend*, Terry was placed in solitary confinement after an attempted prison break and was interrogated about the details of the incident. He confessed that he, Townsend, and two others planned the break and attempted to carry it out. At the joint trial of Terry and Townsend, the prosecutor introduced the confession. Terry denied that he confessed. The Sixth Circuit reversed Terry's conviction because it found that the State had pressured Terry into confessing by placing him in solitary confinement on a diet of bread and water and without medical treatment. The Court also reversed Townsend's conviction because Townsend could not cross-examine Terry on the details of the confession.

In *West*, the defendant's life depended on his being able to show that the co-defendant's story, which placed the primary blame on the defendant, was false and that the co-defendant wanted to shift the blame for the crime to the defendant. In *Townsend*, the defendant might have shown that the co-defendant implicated him because the co-defendant wanted to get out of solitary confinement.

Here, as in *West* and *Townsend*, O'Neil could not question Runnels on the details of the confession. But here, unlike *West* and *Townsend*, O'Neil did not want to question Runnels about the confession. O'Neil knew that the jury would not believe the alibi to which both he and Runnels testified unless Runnels could convince the jury that he did not confess. It was important for O'Neil that Runnels appear to be a witness worthy of belief. O'Neil was anxious to avoid doing anything which might damage Runnels' credibility.

If Runnels had acknowledged the confession, the testimony of the officer would have been admissible against Runnels. O'Neil could have cross-examined Runnels on the confession. *Rios-Ramirez v. United States*, 403 F.2d 1016 (9th Cir. 1968), cert. denied 394 U.S. 951 (1969); *Santoro v. United States*, 402 F.2d 920 (9th Cir. 1968).

If the State had not presented Runnels' confession as part of its case, and if Runnels had testified that he and O'Neil were at O'Neil's house at the time of the crimes, the State could have used the confession to impeach Runnels' testimony. Cf. *Lewis v. Yeager*, 411 F.2d 414 (3d Cir. 1969); *United States v. Ballentine*, 410 F.2d 375 (2d Cir. 1969).

In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes.

Unless we are willing to hold that use of a co-defendant's confession is impermissible when the co-defendant admits that he confessed and when the State uses the confession for impeachment, I do not see how we can decide that the use of the confession under the facts here by a state court was impermissible or that, if it was error, it was error of constitutional proportions. I do not believe *Bruton* requires that we go that far, and I believe that such a decision would be contrary to the recent decisions of this and other Courts of Appeals in *Rios-Ramirez*, *Santoro*, *Lewis*, and *Ballentine*.

I would reverse the decision below and hold that the use of Runnels' confession did not deprive O'Neil of a fair trial.

**Appendix B****In the United States District Court for the  
Northern District of California****Case No. 49,136****Joe J. B. O'Neil,****Petitioner,****vs.****Louis S. Nelson, Warden,****Respondent.****ORDER GRANTING WRIT OF  
HABEAS CORPUS**

Petitioner, Joe J. B. O'Neil, is imprisoned in the California State Prison at San Quentin, California, pursuant to judgment of the Superior Court of the State of California in the County of Los Angeles dated June 17, 1965. The judgment reflects that petitioner was convicted by jury of the felonies of kidnapping for the purpose of robbery, robbery in the first degree and vehicle theft. Petitioner appealed his convictions to the California Court of Appeal and they were affirmed by that Court on March 30, 1967. Petition for rehearing of the appeal was denied April 26, 1967, and an application to recall the remittitur was denied by the Court on February 7, 1968. Thereafter petitioner filed an application for habeas corpus with the California Supreme Court on March 7, 1968

which was denied by that Court without opinion March 20, 1968.

The Court issued its order to show cause herein to the respondent on April 23, 1968. Thereafter, on May 17, 1968, the return to the order to show cause was filed herein by the Attorney General of the State of California in which return respondent argued that petitioner had presented no federal question, relying on the 1957 U.S. Supreme Court case *Delli Paoli v. United States*, 352 U.S. 232 (1957). On May 20, 1968, the U.S. Supreme Court decided *Bruton v. United States*, ..... U.S. ...., to be found at 36 U.S.L. Week 4447, in which it expressly overruled the *Delli Paoli* case. Accordingly, the Attorney General on behalf of the respondent, filed a supplemental return on June 10, 1968 and a second return on June 13, 1968, after the U.S. Supreme Court on June 10 rendered a per curiam decision in *Roberts v. Russell*, 36 U.S.L. Week, 3472.

It is without question herein that the rule laid down in the *Bruton* case applies to our problem. The petitioner's co-defendant, one Runnels, having made a confession implicating petitioner, the confession having been admitted at the trial and submitted to the jury. It is also clear that the case of *Roberts v. Russell* holding that *Bruton* is applicable to the states and is to be given full retroactivity likewise applies to the problem here.

The respondent, therefore, is left to rely upon two points which he vigorously argues to this Court in his supplemental return filed on June 10, 1968:

1) that petitioner has failed to exhaust his available state remedies, and,

2) that in any event, the use of petitioner's co-defendant's statement, while error as to petitioner, was harmless beyond a reasonable doubt.

It is the opinion of this Court that each of these contentions can be readily disposed of.

1) Petitioner has presented his application to the State Supreme Court and in that application he raises the issues which are now before this Court. It is true that that application was presented and denied prior to the decisions of the U.S. Supreme Court in *Bruton* and *Roberts*. The Attorney General requests that in light of the change in law effected by *Bruton*, the state court should be permitted to pass on that question. In this regard, it is to be noted that the date of petitioner's conviction was June 17, 1965 and that the Supreme Court of California thereafter on November 12, 1965 in the case of *People v. Aranda*, 63 Cal.2d 518, established a state rule of practice in accordance with the subsequent rule of the Supreme Court of the United States in *Bruton*. Thereafter the Supreme Court of California reviewed petitioner's application for writ of habeas corpus filed with it on March 7, 1968 and denied without opinion this application on March 20, 1968. The Attorney General has filed with this Court, petitioner's application to the Supreme Court of California, a reading of which will indicate that he raised the same issue in that application as he sets forth herein. It should be noted here that the Supreme Court of California in the case of

*People v. Charles*, 66 Cal.2d 330 (1967) held that the rule established in *Aranda* did not require its application to convictions which had become final. Petitioner's conviction, as indicated above, had occurred on June 17, 1965. It may also be noted that the U. S. Supreme Court on June 10, 1968 decided *Roberts v. Russell*, *supra*, in which case the *Bruton* rule was made applicable to the states and given full retroactivity. Under all these circumstances, it is the opinion and belief of this Court that petitioner herein has exhausted his remedies, his petition having been filed in this Court on May 17, 1968, prior to both the *Bruton* and *Roberts* opinions of the U.S. Supreme Court.

2) The Court is also of the opinion, after a review of the entire record herein, including the transcript of petitioner's trial in the Superior Court and all of the evidence therein that it can not apply the rule in *Chapman v. California*, 386 U.S. 18 (1967) and determine that the statement admitted into evidence by petitioner's co-defendant was harmless error and that the state had proved beyond a reasonable doubt that this error did not contribute to the verdict obtained. It is true that petitioner was identified by the victim of the crimes of which he was convicted and that the identifications were positive as far as the record was concerned, further, that he did have possession of the victim's automobile at the time of his arrest and that the trial court concededly gave clear instructions to the jury to disregard the co-defendant's inadmissible evidence inculcating petitioner. This Court can not at this time second guess what the jury may have considered or not considered in arriv-

ing at its guilty verdicts. The record indicates that both the co-defendant and petitioner testified that they produced other witnesses who testified to their presence elsewhere at the approximate time of the robbery and kidnapping and testified themselves denying the crime, as well as attempting to explain certain of the evidence against them. It is true that the jury may not have believed any of these witnesses offered by the defendants or the defendants themselves and if this is so, then the evidence is overwhelming against them and they are guilty beyond a reasonable doubt, but if the jury gave consideration to this defense evidence, then it can not be said beyond a reasonable doubt that petitioner was not prejudiced and in the context of the joint trial was not deprived of a fair trial because of the inadmissible evidence and the deprivation of his rights to cross-examination in the context of the joint trial.

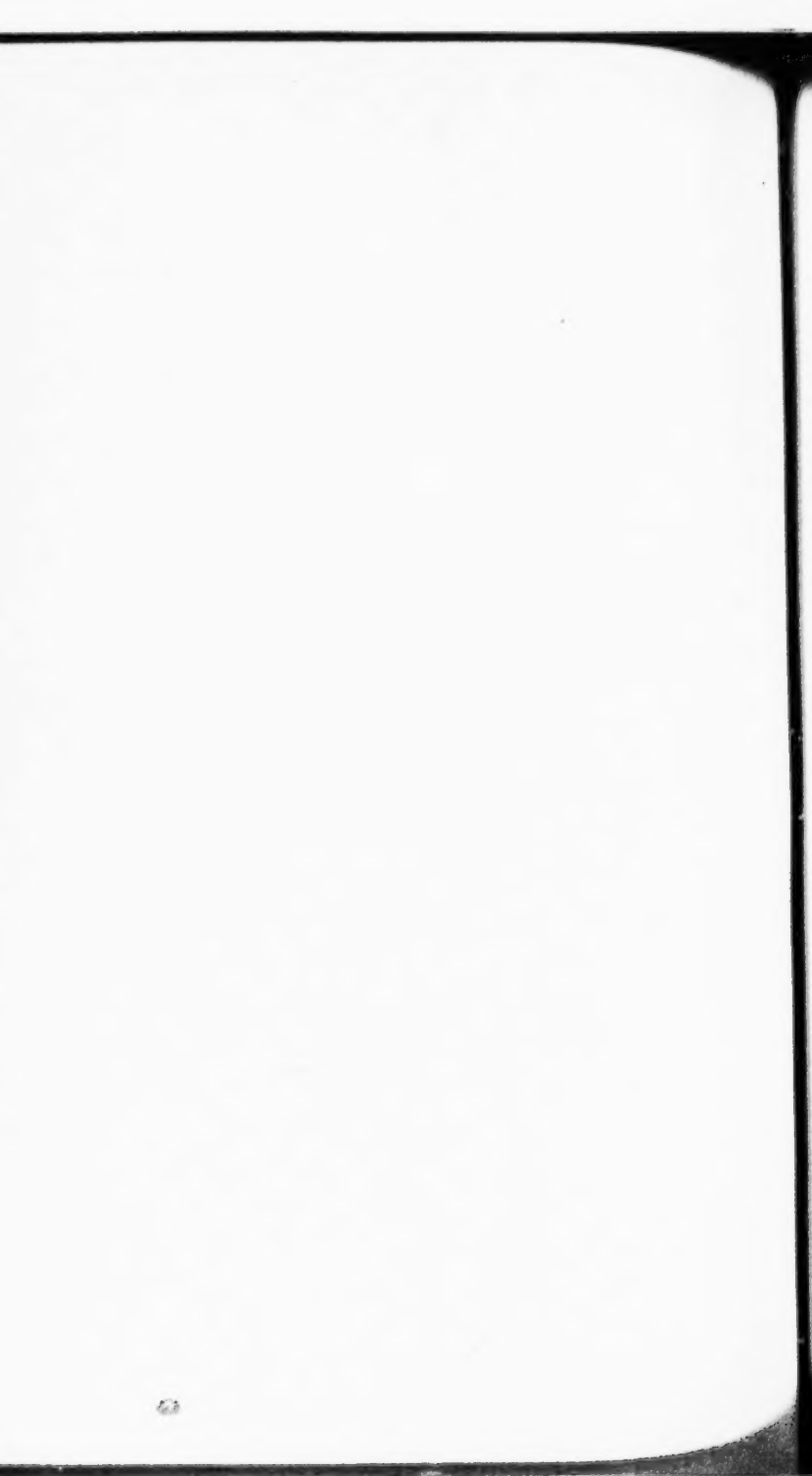
Accordingly, the petitioner is ordered discharged from the custody of the respondent, execution of this order is stayed ten (10) court days to allow the Attorney General to file, if he so desires, notice of appeal. Should such notice of appeal be filed within a period of the above indicated stay, it shall be further stayed and the custody of the petitioner shall not be disturbed until a further order of this Court.

Dated: July 12, 1968.

Albert C. Wollenberg,  
United States District Judge

Filed July 12, 1968,

James P. Welsh, Clerk.



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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1970

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No. 336

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LOUIS S. NELSON, Warden, California State  
Prison at San Quentin,

*Petitioner,*

VS.

JOE J. B. O'NEIL,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit, issued January 26, 1970, is reported at 422 F.2d 319 (1970), and is also included in the Appendix at pp. 111-26. The opinion of the United States District Court for the Northern District of California, issued July 12, 1968, is unreported and is included in the Appendix at pp. 103-07.

### **JURISDICTION**

On January 26, 1970, the United States Court of Appeals for the Ninth Circuit affirmed the order of the United States District Court for the Northern District of California granting Joe J. B. O'Neil's petition for a writ of habeas corpus and ordering him released from state custody. A petition for rehearing was denied, with one judge dissenting, on April 23, 1970. This Court granted certiorari on November 9, 1970.

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### **QUESTIONS PRESENTED**

1. Whether *Bruton v. United States*, 391 U.S. 123 (1968), is violated when a confessing codefendant testifies on the stand, but denies making the statement implicating his codefendant.
2. Whether, under the circumstances of this case, admission of the codefendant's confession was harmful.
3. Whether the doctrine of comity between federal and state jurisdictions and the burden of habeas corpus petitions upon the federal judiciary oblige a federal district court to require a state prisoner to exhaust state remedies made available by newly announced constitutional standards.

### **STATUTE INVOLVED**

The case involves Title 28, United States Code, Section 2254(b), which provides:

"An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an abuse of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

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### **STATEMENT OF THE CASE**

#### **A. Proceedings in the State Courts**

Joe J. B. O'Neil, the petitioner for a writ of habeas corpus below and the respondent herein, was sentenced to state prison by the Los Angeles County Superior Court on July 17, 1965, after a jury had found him guilty of kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. He appealed to the California Court of Appeal, Second Appellate District, which affirmed his conviction in an opinion filed on March 30, 1967 (certified for non-publication). A petition for rehearing was denied on April 26, 1967. He did not file a petition for hearing with the California Supreme Court. An application to recall the remittitur was denied by the California Court of Appeal on February 7, 1967.

O'Neil filed a petition for a writ of habeas corpus with the California Supreme Court on March 7, 1968,

which was denied without written opinion on March 20, 1968.

#### **B. Proceedings in the Federal Courts**

On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. An order to show cause was issued and petitioner filed a return thereto on May 17, 1968. A supplemental return was filed on June 10, 1968, and a second supplemental return was filed on June 13, 1968.<sup>1</sup> O'Neil's traverse was filed on June 21, 1968.

On July 12, 1968, the District Court granted the writ and ordered O'Neil discharged from custody. It also provided that execution thereof was to be stayed ten days to permit filing by petitioner of a notice of appeal and, in the event an appeal was taken, custody was not to be disturbed until further order of the court. On the merits of the case, the District Court concluded that there was harmful *Bruton* error.

Petitioner's notice of appeal was filed on July 22, 1968, and a certificate of probable cause was issued the same day.

On January 26, 1970, a panel of the United States Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed the order of the District Court. A petition for rehearing, received one day late, was ordered filed but on April 23, 1970, the petition

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<sup>1</sup>The first supplement became necessary when this Court overruled *Delli Paoli* in *Bruton v. United States*, 391 U.S. 123 (1968); the second became necessary when, in *Roberts v. Russell*, 392 U.S. 293 (1968), this Court held the *Bruton* rule fully retroactive.

was denied with one judge dissenting. The Ninth Circuit held that there was *Bruton* error because there could be no "meaningful" cross-examination of the respondent's codefendant, and that this error was harmful. It also determined that O'Neil was not obliged to exhaust state remedies.

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### STATEMENT OF FACTS

On February 8, 1965, at approximately 10:30 p.m., Mr. Vance Collins was seated in his 1956 two-door, white Cadillac which was parked in the lot of a supermarket located at 3993 South Western Avenue in the City of Los Angeles. He was awaiting his wife's return from grocery shopping. (RT 10-12.)<sup>2</sup>

Respondent O'Neil approached the passenger door of the Collins' automobile, opened it, and got in. Respondent had a silver-plated gun and was pointing it at Mr. Collins. Respondent told him, "There is a fellow on your other side. Would you let him in?" The driver's side of the door was opened, and Mr. Collins leaned forward to let the second man in. The second man, respondent's codefendant Runnels, sat down in the rear seat. (RT 12-15.)

Respondent told Mr. Collins to back the car out of the lot. Mr. Collins, in fear, did as he was told. Respondent continued to give him directions. As the

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<sup>2</sup>As hereinafter used, "RT" refers to the reporter's transcript of respondent's state trial which was lodged with the District Court below, was before the Court of Appeals, and is part of the record herein.

victim drove, respondent told him that he "might get hurt real bad" if he didn't have money. Respondent ordered Mr. Collins to hand over his wallet. Eight dollars was taken, and Runnels returned the wallet to him. (RT 16, 18-20.)

Approximately three and one-half blocks from the market, respondent ordered the victim to stop and exit from the car. Respondent still had the gun pointed at him. Respondent ordered Mr. Collins to walk to the rear of the car and then to cross the street. Runnels got out of the back seat and stood beside the vehicle for some time. Runnels then got into the driver's seat and drove away with O'Neil. Mr. Collins returned to the market and notified the police. (RT 17, 22-24, 42-43, 60.)

Approximately 1:00 a.m., February 9, 1965, a police patrol unit received a radio message that a white automobile with two male Negro occupants was suspiciously circling a liquor store. The officers drove to the liquor store and talked to the manager. The manager told the officers that the white vehicle was first pointed out to him by a customer. The manager then observed the vehicle circle the block two or three times. These circumstances caused the manager to become apprehensive and telephone the police. (RT 63, 67-68, 72, 89.)

At this point, one of the officers saw a white car with two male Negroes approaching in an alley near the liquor store. The vehicle was going slowly, and the manager said, "That is the vehicle." The automobile was a 1956 white Cadillac. (RT 69, 70, 75.)

Officers began following the Cadillac. O'Neil was the passenger and Runnels was the driver. During the pursuit, O'Neil was observed to throw what appeared to be a shiny revolver from the car. Officers, with the red light and siren, stopped the suspects. On the basis of the radio call and the weapon, both occupants were taken into custody on suspicion of armed robbery when they alighted from the vehicle. Officers returned to the location where the object landed and retrieved a silver-plated .22 caliber revolver which was loaded with four bullets. (RT 63-66, 71, 75, 78-80.)

O'Neil and Runnels were taken to the Culver City Police station and the Cadillac was impounded. Approximately 4:00 p.m., February 9, 1965, they were formally arrested by Los Angeles Police officers and were taken to the University Police station. On the evening of February 9, 1965, Mr. Collins went to the University Police station. He was told that the thieves may have been apprehended. Mr. Collins was asked to view a police lineup and he positively identified O'Neil and Runnels from the lineup. (RT 26-27, 34-35, 48, 80, 96.)

The next day, February 10, 1965, at approximately 10:20 a.m., Officer Traphagen had a conversation with Runnels. Runnels was advised that he did not have to say anything; that anything he said might be used in a later criminal prosecution; and that he had a right to an attorney. There was no coercion nor were there any promises of immunity. Runnels proceeded to make a complete confession implicating O'Neil. The court admitted the confession with an admoni-

tion to the jury that it was not to be considered against O'Neil.<sup>3</sup> (RT 92-93, 102-05; App. at 128-29, 137-40.)

### **The Defense**

The mother and sister of O'Neil testified that he and Runnels came to the O'Neil home at approximately 9:00 p.m. on February 8, 1965. They departed shortly after 11:00 of that same evening. The mother also testified that after her son's arrest, she was told by Mr. Collins that he was unsure of the identification. (RT 162-63, 167, 175-77.)

Mr. Lee Brooks testified that on February 8, 1965, at approximately midnight, he observed O'Neil and Runnels sitting in a big white car near 61st Street and Vermont Avenue in the City of Los Angeles. An unknown man approached the car and began conversing with them. The man handed what appeared to be keys to one of them. Runnels got into the driver's seat and drove off with O'Neil. (RT 145-47, 149-52, 157.)

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<sup>3</sup>The trial judge gave limiting instructions when the confession was actually introduced (RT 102; App. at 137) and gave the following standard instructions before the jury retired:

"Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against any other defendant.

"Where evidence has been received of a statement by one of the defendants after his arrest and in the absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant." (App. at 245-46.)

Runnels testified that he was with O'Neil on the afternoon and evening of February 8, 1965. Runnels stated that he and O'Neil left the O'Neil household approximately 11:00 p.m. While sitting at a bus stop around midnight, they obtained a ride from a person known as "Gary". Gary was driving a white 1956 Cadillac. He drove them to a night club and went inside. They remained seated in Gary's automobile. Shortly thereafter, Gary returned to the car and began conversing with O'Neil. Approximately 12:20 a.m., February 9, 1965, Gary gave the keys to O'Neil. O'Neil was directed to bring the car back to the night club around 2:00 a.m. (RT 181, 185-89, 200, 207; App. at 143-47, 156, 162.)

Since O'Neil did not have a driver's license, Runnels drove. They headed for Santa Monica, but on the way O'Neil discovered a gun in the glove compartment. They drove around the block and into an alley to find a place to throw the gun. O'Neil threw the gun out of the window. At this point, they were stopped and arrested by police, Runnels denied making any statement to police officers. (RT 189-92, 211, 213; App. at 147-50, 165-67.)

Miss Mildred Manchester, the common law wife of Runnels, testified that she talked with Officer Trapbagen on the morning of February 11, 1965. She was informed that the officer would see that Runnels got a life sentence if no statement was made as opposed to a lesser sentence if the statement was forthcoming. She was asked to see what could be done. Later that day, Miss Manchester received a telephone call from

Runnels, and she relayed the officer's message. Runnels informed her that he was not going to make a statement. (RT 137-38, 140, 143.)

O'Neil testified that he spent the evening of February 8, 1965, in the company of Runnels. His version of the facts paralleled the story told by Runnels. In addition, O'Neil was able to identify "Gary" as James Garret. O'Neil admitted knowing the residence of Garret, but on cross-examination indicated that no attempt was made to subpoena him. (RT 217, 220, 238.)

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#### SUMMARY OF ARGUMENT

The Court of Appeals concluded that when the statement of a codefendant implicates another, non-confessing codefendant, and the confessing codefendant takes the stand and testifies, then the right of confrontation is satisfied only if he *admits* making the statement, but is not satisfied if he *denies* making it. Yet, *Douglas v. Alabama*, 380 U.S. 415 (1965), and other opinions of this Court demonstrate that the right of confrontation is satisfied if there is *opportunity* to cross-examine. This opportunity exists regardless of whether the codefendant admits or denies the statement, for in either case he may be asked about the content of the statement itself.

In the present case, meaningful cross-examination was possible and in fact accomplished, albeit by the prosecution. There is no reason why O'Neil himself could not have made the same inquiry. Furthermore,

the most successful cross-examiner could not hope for a better result; the denial that the statement was made and the testimony favoring O'Neil. Thus the Court of Appeals erred in concluding that meaningful cross-examination was not possible.

In any event, the admission of the statement was harmless. First, under *California v. Green*, 395 U.S. 149 (1970), the statement was admissible as substantive evidence against O'Neil. Secondly, admission of the statement did not have a devastating impact upon O'Neil's defense because the other evidence was overwhelming, and because the statement itself did not attempt to shift the blame or serve as the only evidence connecting O'Neil with the crime. Runnels also denied confessing and gave testimony supporting O'Neil's defense, O'Neil was afforded the opportunity to cross-examine Runnels, and limiting instructions were given.

Lastly, petitioner suggests that it was wholly inappropriate for the District Court to decide the *Bruton* question since the state courts had not been given an opportunity to consider the issue.

## ARGUMENT

### I

#### THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IS SATISFIED IF THERE IS AN OPPORTUNITY TO CROSS- EXAMINE.

Citing *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, 391 U.S. 123 (1968), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), the majority opinion below concluded that O'Neil was denied the right of confrontation because Runnels denied making the confession implicating O'Neil and thereby precluded effective cross-examination. *O'Neil v. Nelson*, *supra*, at 321 (App. at 114-15). The majority misconstrued *Douglas*, misinterpreted *Bruton*, and both misconceived and failed to examine the options available under the right of confrontation.

As a panel of the Sixth Circuit did in *Townsend v. Henderson*, *supra*, at 329, the majority seized upon fortuitous language found in *Douglas*, and quoted in *Bruton*, for the proposition that only if the confessing codefendant *admits* making the statement (here, Runnels denied making it) can the accused have effective cross-examination, *O'Neil v. Nelson*, *supra*, at 321 (App. at 114):

“[E]ffective confrontation of Loyd [the codefendant] was possible only if Loyd affirmed the statement as his. Loyd did not do so but relied on his privilege to refuse to answer.” *Douglas v. Alabama*, *supra*, at 420, quoted in *Bruton v. United States*, at 127.

Yet when this Court in *Douglas* noted that “effective confrontation of Loyd was possible only if Loyd

affirmed the statement as his," the Court was merely stating that cross-examination was impossible where a codefendant stood fast on his right against self-incrimination and thus did not testify at all. Obviously, as long as Loyd invoked his fifth amendment right, he could not be cross-examined, whereas if he waived that right and testified, then he could be fully cross-examined. That this is indeed the proper interpretation of *Douglas* is suggested by *California v. Green*, 399 U.S. 149, 162-63 (1970), in which this Court stated:

"[I]n *Douglas v. Alabama*, . . . the defendant's supposed accomplice, Loyd, . . . refused to testify on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement; had such cross-examination taken place, the opinion strongly suggests that the confrontation problem would have been nonexistent. . . ."

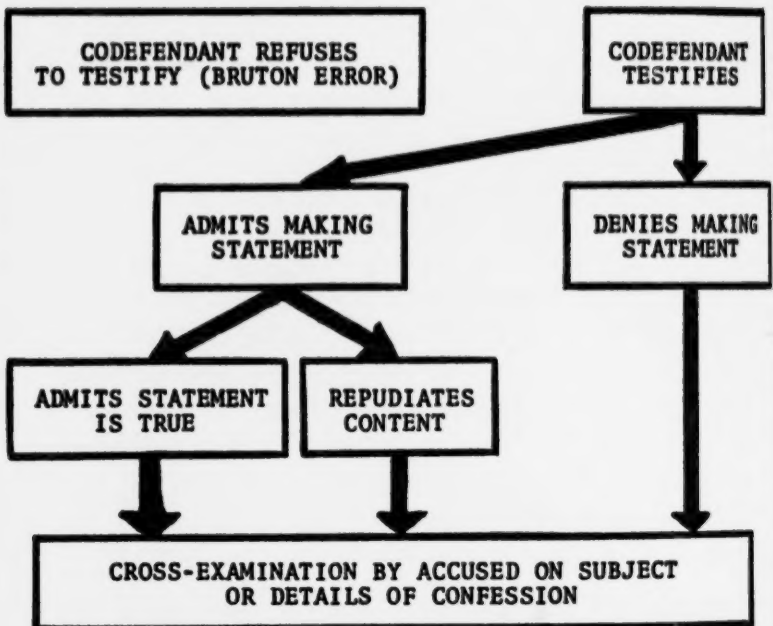
The same language from *Douglas* was quoted in *Bruton* because a similar conflict between fifth and sixth amendment rights was involved. But as this Court observed in *California v. Green*, "No confrontation problem would have existed if *Bruton* had been able to cross-examine his co-defendant." *Id.* at 163 (footnote omitted).

Neither *Douglas* nor *Bruton* stands for the proposition that if the codefendant takes the stand, but denies rather than admits making the statement, an accused is deprived of an opportunity to subject his codefendant to effective cross-examination. This becomes patently clear when the options available to

the accused are examined. As illustrated in Figure A, below, there are only a few possible avenues of cross-examination available when the confession of a codefendant is introduced at trial:

**Figure A**

**OPTIONS AVAILABLE TO CROSS-EXAMINE  
CONFESSING CODEFENDANT**



If the codefendant does not take the stand (*Bruton*), or if he is called but refuses to testify (*Douglas*) then

the accused cannot cross-examine him. However, if the codefendant testifies, he either admits or denies making the statement. If he admits making the statement, he either admits that the statement is true or repudiates its content and testifies that the statement is false. But if the codefendant testifies, regardless of whether he admits or denies making the statement, he is always subject to cross-examination by the accused upon the subject or details of the confession. Whether the codefendant admits or denies making the statement, insofar as the accused's right of confrontation is concerned, the result is always the same. In its most recent opinion on this subject, which declined to follow its 1968 decision in *Townsend v. Henderson*, *supra*, the Sixth Circuit held:

"A defendant is not denied his Sixth Amendment right to confrontation when a codefendant's incriminating statement, which implicates the defendant, is used against the codefendant during trial if subsequently the codefendant takes the stand in his own behalf. *The right to confrontation would then exist for the defendant regardless of whether the codefendant denies or admits making all or part of the incriminating and implicating statement.*" *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970) (emphasis added).

When that portion of the *Douglas* opinion upon which the Ninth Circuit relied is taken in context, *Douglas* supports the above proposition. In *Douglas*, this Court observed:

"In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged

confession plainly denied him the right to cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of Loyd's alleged statement and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to him but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate. . . . [S]ince their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself." *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965), partially quoted in *Bruton v. United States*, 391 U.S. 123, 127 (1968).

The defect in *Douglas* arose because Loyd's invocation of his right against self-incrimination precluded any cross-examination. Therefore Douglas could not cross-examine Loyd as to whether "[1] the statement had been made and that [2] it was true." See also *Bruton v. United States*, 391 U.S. 123, 127 (1968). Even if the police officers could be examined as to whether the statement had been made, Loyd could still not be cross-examined "to test the truth of the statement

itself." Thus, what *Douglas* really demonstrates is that there are always two possible questions which can be asked on cross-examination of any codefendant who takes the stand: (1) Did you make the statement [Yes? No?]; and (2) Is the content of that statement true? See *California v. Green*, 399 U.S. 149, 158-59 (1970).

It is obvious that the availability of cross-examination into the substance of the statement does not depend upon whether the codefendant admits making the statement, for even if he does not, the accused may still inquire into the facts contained in the purported confession; "the truth of the statement itself." Therefore the availability and scope of inquiry remains the same.

That this type of cross-examination was possible in this case need not be the subject of speculation, for such inquiry was actually had, albeit by the prosecution and counsel for Runnels. For example, the prosecutor inquired as to whether Runnels had made the statement at all:

"Q. No do you remember talking to Officer Traphagen?

A. Remember talking to him?

Q. Yes, about this case?

A. Ain't talked to him about no case, no.

Q. Didn't you ever talk to him about the case?

A. No, I didn't talk to him about the case.

Q. Did he talk to you about the case?

A. Yeah, he talked to me about it.

Q. Did he ask you any questions about your whereabouts that night?

A. Yes, he asked me.

Q. Did he ask you whether or not you had robbed this man, Mr. Collins?

A. Yes, he asked me that.

Q. Did he ask you whether or not you had taken his car?

A. He asked me that.

Q. Did he ask you what you were doing down in Culver City.

A. Yes.

Q. Did you tell him that you had met O'Neil earlier that night and talked about committing some robberies?

A. I didn't tell him anything. I told him I had no comment to make.

Q. Didn't you tell him that you went down to the Better Food Market?

A. Well, after he told me whatever I said would be held against me, and I could wait to talk to a lawyer, I decided I would wait to talk to a lawyer, and I didn't make no statement.

Q. None whatsoever?

A. That's right." (RT 210:9-211:16; App. at 164-65.)

"Q. Didn't you tell Officer Traphagen you went into the liquor store?

A. I told you I made no statement to Mr. Traphagen.

Q. You refused to talk to him?

A. That's right.

Q. Everything Officer Traphagen said you told him, he is either mistaken or lying?

A. One of the two he is doing." (RT 213:4-12; App. at 166-67.)

On direct examination, Runnels denied making the statement. (RT 192:12-18; App. at 150.) He also denied its substance.

"Q. Had you committed this robbery?

A. No." (RT 192:10-11; App. at 149.)

*Douglas* requires that the accused be afforded an opportunity to cross-examine the confessing codefendant as to (1) whether he made the statement, and (2) the content of the statement. Such inquiry was made by both Runnels' attorney and the prosecution, and is similar to that found to remove any possibility of *Bruton* error in another Ninth Circuit case, *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968). There is, as suggested in *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968), no reason why O'Neil could not have done so too. And furthermore, as the Seventh Circuit observed in *Trigg v. United States*, 430 F.2d 372, 375 (7th Cir. 1970), the defendant's "failure to examine his codefendant was the product of his own inaction and not the result of governmental improprieties." See also *United States v. Catino*, 403 F.2d 491, 496 (2d Cir. 1968).

The availability of cross-examination does not turn on whether the codefendant admits or denies the statement. *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970); cf. *California v. Green*, 399 U.S. 149, 158-59 (1970). Actually O'Neil could not have hoped for a greater benefit from cross-examination than when Runnels denied making the confession. As the dissenting opinion in the court below states:

"In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil

all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes." *O'Neil v. Nelson, supra*, at 325 (App. at 125).

The Fifth Circuit made the same analysis: that the confessing codefendant gives the defendant the maximum benefit of cross-examination when he denies making the statement. *Baker v. Wainwright*, 422 F.2d 145, 148 (5th Cir. 1970). And in *California v. Green*, 399 U.S. 149, 159 (1970), this Court suggested the same conclusion:

"The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant."

The opinion of the Ninth Circuit herein, and of other courts reaching the same result,<sup>4</sup> rather than

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<sup>4</sup>The Ninth Circuit is not the only court which has at one time, with at least one panel of judges, decided that where the codefendant denies making the statement then there can be no meaningful cross-examination. In *West v. Henderson*, 409 F.2d 95, 97 (6th Cir. 1969), and *Townsend v. Henderson*, 405 F.2d 324, 329 (6th Cir. 1969), several panels of the Sixth Circuit reached this conclusion. However, in *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970), after referring to *West* and *Townsend* as an inconsistent line of cases, the Sixth Circuit specifically held that the right of confrontation did not depend upon whether the statement was admitted or denied. But *Sims* did not overrule either *West* or *Townsend*. In a somewhat similar vein is *United States v. Guajardo-Melendez*, 401 F.2d 35, 38-39 (7th Cir. 1968), in which a panel of the Seventh Circuit held that where an agent testified as to a confession by Hernandez implicating Guajardo-Melendez, and Hernandez testified (he was not cross-examined, however), there was error. The court therein held that the *Bruton* rationale did not strictly apply and gave no specific basis for the decision. *Ibid.* However, it would appear

underscoring the role of cross-examination seems to belittle it. In *California v. Green*, 399 U.S. 149, 158-59 (1970), this Court emphasized the function of confrontation in testing the credibility of extrajudicial statements—if not the availability of cross-examination when the statement is denied:

“Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for discovering the truth’; (3) permits the jury that is to decide the defendant’s fate to

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that *Guajardo-Melendez* was considered by the court to be more a case of prosecutorial misconduct than *Bruton* error. See *id.* at 39. Yet *Guajardo-Melendez*, insofar as it turns on *Bruton*, seems inconsistent with the subsequent decision in *Trigg v. United States*, 430 F.2d 372 (7th Cir. 1970). In that case statements of Burris were related by Turnbou in rebuttal to Burris’ testimony. No *Bruton* error was found since Trigg could have called Burris back to the stand for further examination. *Id.* at 374-75. *Guajardo-Melendez* was held inapplicable since the incriminating statements were either neutral or necessary to prove Burris’ illegal intent, *id.* at 375, thus supporting our conclusion that *Guajardo-Melendez* was not really a *Bruton* case at all. One other case also deserves mention. In *United States v. Bujese*, 378 F.2d 719 (2d Cir. 1967), a codefendant took the stand and denied guilt, but on cross-examination, when confronted with a confession implicating Bujese, confessed. However, the codefendant testified that insofar as his statement implicated Bujese, it was incorrect; Bujese had refused to take part in the crime. The Second Circuit initially affirmed the conviction, but this Court vacated and remanded for reconsideration in light of *Bruton*, 392 U.S. 297 (1968). On remand, the case was reversed without discussion of the *Bruton* aspect. *United States v. Bujese*, 405 F.2d 888, 889 (2d Cir. 1969). *Bujese*, however, cannot be reconciled with a later Second Circuit case, *United States v. Insana*, 423 F.2d 1165 (2d Cir. 1970). In that one, Schurman had made extrajudicial statements implicating Insana, but took the stand and claimed he could not remember. Without mentioning *Bujese*, the court therein held that there was no *Bruton* error. *Id.* at 1168.

observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

"It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, *deny*, or qualify the truth of the prior statement under the penalty of perjury. . . ." (Emphasis added.)

It is obvious from *Bruton v. United States*, 391 U.S. 123, 128, 132, 136 (1968), and *Harrington v. California*, 395 U.S. 250, 252-53 (1969), that if the accused is given the *opportunity* to cross-examine, the sixth amendment right of confrontation has been satisfied. This seems to be the view of the various other courts of appeals.<sup>5</sup> Even five other panels of

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<sup>5</sup>*United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970); *Trigg v. United States*, 430 F.2d 372, 374-75 (7th Cir. 1970); *United States v. Insana*, 423 F.2d 1165, 1168 (2d Cir. 1970); *Baker v. Wainwright*, 422 F.2d 145, 147-48 (5th Cir. 1970); *United States v. Cale*, 418 F.2d 897, 899 (6th Cir. 1969); *United States v. Weston*, 417 F.2d 181, 187 (4th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *United States v. Marine*, 413 F.2d 214, 217-18 (7th Cir. 1969); *United States v. Catino*, 403 F.2d 491, 496 (2d Cir. 1968); see *United States ex rel. Cheeks v. Russell*, 424 F.2d 647 (3d Cir. 1970); *McHenry v. United States*, 420 F.2d 927, 928 (10th Cir. 1970); *United States ex rel. Long*

the Ninth Circuit have suggested as much.<sup>6</sup> It is also the central holding of *California v. Green*, 199 U.S. 149, 153, 158 (1970).

That a defendant fails to cross-examine because the codefendant denies making the statement and hence believes that cross-examination would be fruitless—apparently the rationale behind the Ninth Circuit's conclusion that there could be no "meaningful" cross-examination—does not render the witness unavailable for cross-examination. *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970); see *United States v. Inzana*, 423 F.2d 1165, 1168 (2d Cir. 1970); cf. *California v. Green*, 399 U.S. 149, 158-59 (1970). When he denies making the statement, the codefendant actually diminishes its impact. See *California v. Green*, *supra*, at 159. Thus the proper resolution of the question now before this Court is found in *United States v. Sims*, *supra*, and *Baker v. Wainwright*, 422

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*v. Pate*, 418 F.2d 1028, 1030 (7th Cir. 1970); *Hawkins v. United States*, 417 F.2d 1271, 1273 (5th Cir. 1969) cert. denied, 397 U.S. 914 (1970); *James v. United States*, 416 F.2d 467, 475 (5th Cir. 1969); *United States v. Hoffa*, 402 F.2d 380, 387 (7th Cir. 1968), *vacated on other grounds sub nom. Giordano v. United States*, 394 U.S. 310 (1969).

Cases which support respondent's position, together with subsequent cases casting doubt upon their continued vitality, are discussed in footnote 4, *supra*, at pp. 20-21.

<sup>6</sup>*Mendez v. United States*, 429 F.2d 124, 128 (9th Cir. 1970); see *Ignacio v. Guam*, 413 F.2d 513, 515 (9th Cir. 1969); *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968); *Rios-Ramirez v. United States*, 403 F.2d 1016, 1017 (9th Cir. 1968); *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968).

Two other Ninth Circuit cases are neutral: *Byrd v. Comstock*, 430 F.2d 937, 938 (9th Cir. 1970); *United States v. Eide*, 427 F.2d 543, 544 (9th Cir. 1970). No *Bruton* error was found in *Eide* because the codefendant confirmed the statement in substance, nor in *Byrd*, because the codefendant admitted part of the statement.

F.2d 145, 147-48 (5th Cir. 1970). Insofar as the majority opinion below holds that O'Neil was denied the right of confrontation, it is wrong.

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11

**ANY POSSIBLE ERROR IN ADMITTING RUNNELS'  
CONFESSION WAS HARMLESS.**

There are at least two reasons why the admission of the codefendant's statement was harmless. The first of these is that the type of situation arising in O'Neil's case does not even give rise to error of constitutional dimension. As long as the declarant (here Runnels) is available for cross-examination, then even the use of his statement as substantive evidence against his codefendant is not constitutional error. *California v. Green*, 399 U.S. 149, 153-64 (1970). O'Neil got even better than that, for the evidence was admitted only against Runnels (RT 102; App. at 137).

Secondly, under *Harrington v. California*, 395 U.S. 250 (1969), *Bruton* error may be considered harmless where the evidence presented by the prosecution was overwhelming. Even if the disavowal of his confession by respondent's codefendant and respondent's failure to cross-examine his codefendant were considered *Bruton* error, since the evidence was overwhelming, and the confessions did not have a devastating impact upon respondent's defense, any error was harmless.

*Bruton* error is "harmful" error only if the codefendant's confession has a devastating impact upon the non-confessing defendant's defense. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court observed that under some circumstances a jury could be expected to follow limiting instructions, while in others:

"[1] the risk that the jury will not, or cannot, follow instructions is so great, and [2] the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

In *Bruton*, if the codefendant's confession were excluded, *Bruton's* involvement in the crime rested solely upon the testimony of a single witness whose identification could not be supported through the testimony of the only other eyewitness. Since neither defendant offered a defense, the codefendant's confession obviously had a vital effect upon the case. The necessity of a devastating impact before *Bruton* error can be held harmful has also been suggested by several lower courts which have applied the rule<sup>7</sup> and appears to be the conclusion of this Court in *Dutton v. Evans*, \_\_\_\_\_ U.S. \_\_\_\_\_, \_\_\_\_\_, 91 S.Ct. 210, 219 (1970).

In *Harrington v. California*, 395 U.S. 250, 254 (1969), the *Bruton* error was found harmless because

<sup>7</sup>Cases finding no "vital impact" include: *Wapnick v. United States*, 406 F.2d 741, 742-43 (2d Cir. 1969); *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968); see *United States v. Carlson*, 423 F.2d 431, 437-38 (9th Cir. 1970); *Santoro v. United States*, 402 F.2d 920, 923 (9th Cir. 1968). Cases finding a "devastating effect" include: *United States ex rel. LaBelle v. Mancusi*, 404 F.2d 690 (2d Cir. 1968); *United States v. Jones*, 402 F.2d 851 (2d Cir. 1968).

"the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt. . . ." This Court therein noted that one of the confessing codefendants who implicated Harrington testified and was cross-examined. *Id.* at 253. Other witnesses "testified he had a gun and was an active participant." *Ibid.* Furthermore, "the case against Harrington was not woven from circumstantial evidence." *Id.* at 254. Even though the implicating confessions of two codefendants who did not testify were erroneously admitted, "apart from them the case against Harrington was . . . overwhelming. . . ." *Ibid.* (Emphasis added.) This Court thus held that *Bruton* error was harmless if overwhelming evidence apart from that erroneous under *Bruton* had been offered at trial.

The majority below concluded that Runnels' confession was "harmful" to the defense because "some doubt was raised about the victim's identifications," "the alibi witnesses stuck to their stories," and "the remarkable agreement between Runnel's [sic] out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery." *O'Neil v. Nelson*, *supra*, at 322-23 (App. at 118). The appropriate inquiry, however, is not whether the confession may have had *any* effect upon the trial, see *Harrington v. California*, 395 U.S. 250, 254 (1969), but whether it had a "devastating impact" upon the defense because of its content, the nature of the defense, and the state of the prosecution's evidence absent that confession,

see *Dutton v. Evans*, ..... U.S. ...., 91 S.Ct. 210, 219 (1970).

Under the facts of this case, the Runnels' confession could not have had any significant effect upon O'Neil's defense for a number of reasons:

(1) Absent Runnels' confession, the evidence was overwhelming. The victim, a percipient witness, positively identified O'Neil and Runnels as the two men who robbed him and stole his car, threatening him with a silver-plated pistol. O'Neil and Runnels were found driving the victim's car, and O'Neil was seen throwing a silver-plated pistol away.

(2) The confession did not have a devastating impact upon O'Neil's defense since:

(a) It was merely descriptive, and did not attempt to shift the blame to O'Neil. Compare *United States ex rel. LaBelle v. Mancusi*, 404 F. 2d 690 (2d Cir. 1968).<sup>8</sup>

(b) It was not the only substantial evidence connecting O'Neil to the crime. Compare *Bruton v. United States*, 391 U.S. 123, 127-28 (1968) (which must be read in light of the facts set out in 375 F.2d 355, 357); *United States v. Jones*, 402 F.2d 851 (2d Cir. 1968).

<sup>8</sup>The majority opinion states, "Runnels' purported statement . . . gives considerable credit to O'Neil for masterminding and directing the day's work." *O'Neil v. Nelson*, *supra*, at 320 (App. at 112). The only support for such a conclusion to be found in Runnels' confession is where he states, "O'Neil asked him if he wanted to make a couple of hits," and "O'Neil had the gun . . . [and] went up to the driver . . . ." (RT 103; App. at 137-38.) In every other case, Runnels said "they" did this or that. The quoted passages can hardly be characterized as crediting O'Neil with "masterminding and directing."

(c) O'Neil had the opportunity to cross-examine Runnels, but declined to do so. See *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968); *United States v. Catino*, 403 F.2d 491, 496 (2d Cir. 1968).

(d) Runnels actually took the stand, denying having confessed and repudiating the contents of the confession by testimony contrary thereto. *Baker v. Wainright*, 422 F.2d 145, n.9 at 148 and accompanying text (5th Cir. 1970); see *California v. Green*, 399 U.S. 149, 159 (1970).

(e) Runnels' testimony at trial fully supported O'Neil's defense. See *United States v. Panepinto*, 430 F.2d 613, 617 (3d Cir. 1970).

(3) Limiting instructions were given. See *Harrington v. California*, 395 U.S. 250 (1969); cf. *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970).

Insofar as the majority opinion concludes that any error was "harmful," it is erroneous.

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### III

#### **FAILURE TO ADHERE TO THE EXHAUSTION DOCTRINE UNDERMINES FEDERAL-STATE RELATIONSHIPS AND UN-DULY BURDENS FEDERAL COURTS.**

As the majority opinion notes, *O'Neil v. Nelson*, *supra*, at 323 (App. at 119), "the *Bruton* question was never presented to the state courts for the very good reason that *Bruton* had not been decided when

O'Neil filed his federal petition." Under previous decisions of the Ninth Circuit, a federal habeas petitioner is required to exhaust state remedies made available by the announcement of new constitutional standards before he applies to the federal courts for relief. *Ashley v. California*, 397 F.2d 270, 271 (9th Cir. 1968); *United States ex rel. Walker v. Fogliani*, 343 F.2d 43, 46-48 (9th Cir. 1965); *Blair v. California*, 340 F.2d 741, 744 (9th Cir. 1965).

Some court must assess the "*Bruton* error" in light of the trial record, and determine whether in view of the evidence at trial, and the nature and content of the confession, the admission of the confession was harmless. This task should initially be left to the state courts, which have shown their willingness to examine *Bruton* claims, see, e.g., *In re Whitehorn*, 1 Cal.3d 504, 506, 509, 82 Cal.Rptr. 609, 611-12 (1969), both in the interests of comity and to reduce the burdens upon the federal courts; these being the purposes of Title 28 United States Code, section 2254(b). As this Court only recently noted in *California v. Green*, 399 U.S. 149, 168-70 (1970), a harmless-error question is more appropriately resolved by the state court in the first instance. Insofar as the majority below concludes that it was proper for the district court to pass upon the *Bruton* claim without referring the petitioner to the state courts, the majority opinion errs.

**CONCLUSION**

As a result of the majority opinion below, which cannot be reconciled with *Green*, the sixth amendment right of confrontation has been contorted beyond recognition, the *Bruton* rule carried past the pale of logic, and *Harrington* has suffered serious erosion. Furthermore, delicate federal-state relations are subjected to unnecessary strain while the federal judiciary shoulders an even greater share of the burden of collateral review. For these reasons, we respectfully urge that the judgment below be reversed.

Dated, San Francisco, California,  
January 28, 1971.

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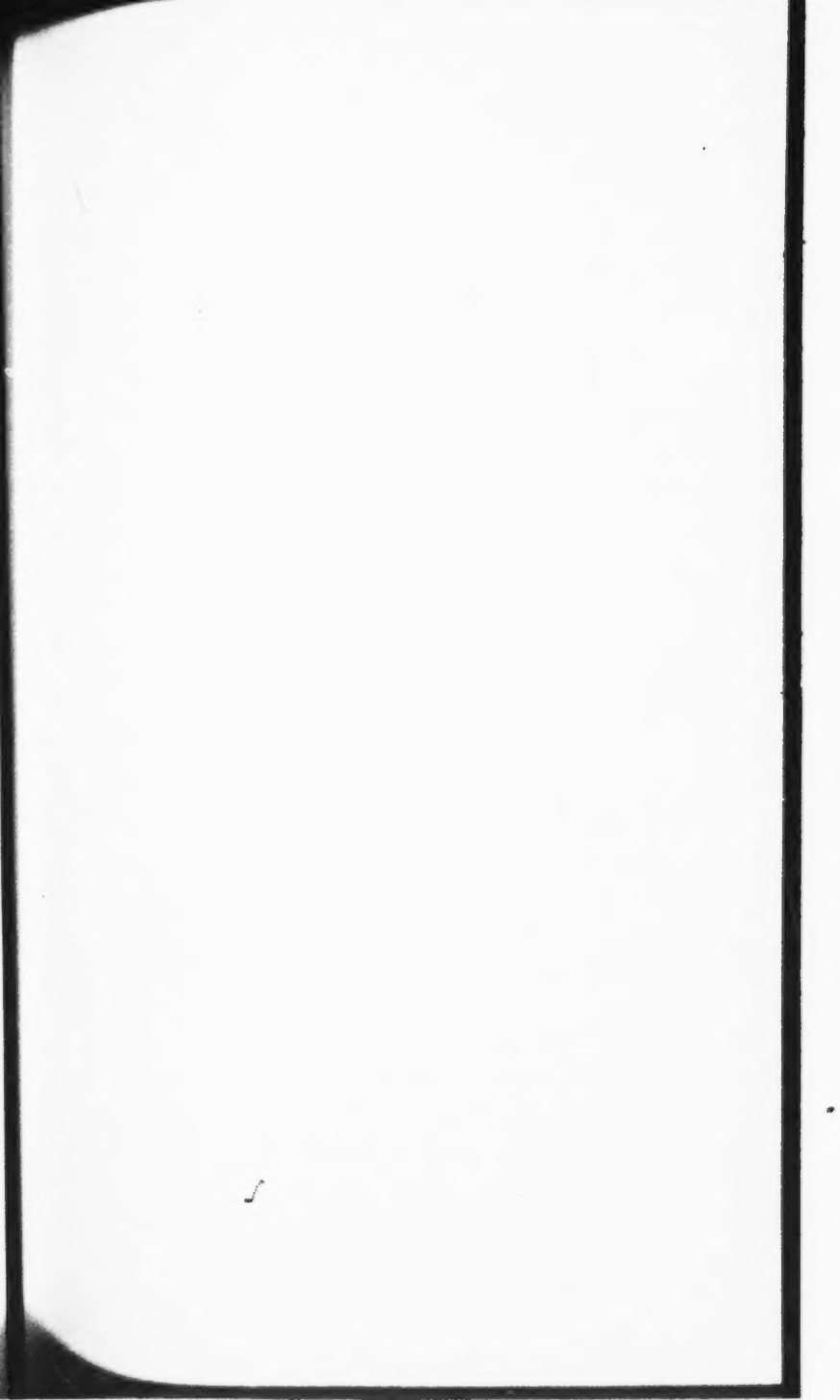
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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1970**

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**No. 336**

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**LOUIS S. NELSON, WARDEN, CALIFORNIA STATE  
PRISON AT SAN QUENTIN,**

*Petitioner,*

**v.**

**JOE J. B. O'NEIL**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR RESPONDENT**

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**QUESTIONS PRESENTED**

In a joint criminal trial before a jury the prosecution was allowed to introduce into evidence testimony by a police officer that during custodial interrogation of one of the accused, Runnels, he obtained from him an oral statement which, as reported in court by the officer, incriminated not only Runnels but also the other accused, respondent O'Neil. The questions presented are:

1. Whether the fact that Runnels took the stand and denied having made any statement removes the case from the rule of *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Bruton v. United States*, 391 U.S. 123 (1968).

2. Whether, in light of the evidence properly admitted, the case against O'Neil was so overwhelming that a reviewing court should conclude that admission of the evidence of Runnels' statement was harmless beyond a reasonable doubt.

3. Whether, after the state courts have reviewed O'Neil's claim on both direct and collateral review, any policy underlying the doctrine of exhaustion of remedies would be served by requiring O'Neil to return to the state courts yet another time.

## STATEMENT

### A. THE TRIAL

Respondent O'Neil and a co-defendant, Runnels, were jointly tried and convicted by a California jury on charges of kidnapping for purposes of robbery, armed robbery and vehicle theft. (A. 103)<sup>1</sup> The prosecution's case was presented through the testimony of the victim and two policemen.

The victim testified that two men entered his parked car at gunpoint at 10:30 p.m. on the night of February 8, 1965, in the city of Los Angeles. According to the victim, they forced him to drive several blocks, and after taking about eight dollars from him and making him get out of the car, they drove off. (R.T. 10-22) The victim at once reported the crime to the police. (R.T. 23) Subsequently, at a line-

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<sup>1</sup>"A." refers to the printed Appendix herein. "R.T." refers to the Reporters' Transcript of the State trial proceedings, on file with the Clerk. "Pet. Br." refers to the Brief for the Petitioner herein. It should be noted that the excerpts from the Reporters' Transcript printed in the Appendix do not always appear in order.

up (R.T. 27) and at trial (R.T. 13, 15), he identified O'Neil and Runnels as the two men who had committed the crime.

One of the two policemen, a Culver City patrol officer, testified that in the early morning hours of February 9 he had responded to a call from a liquor store manager concerning a "suspicious white vehicle with two male Negro occupants" circling the store. (R.T. 63, 67-68) When he followed the vehicle in his squad car, one of the occupants threw a gun from the vehicle. (R.T. 64) Thereupon, he stopped the vehicle and arrested its occupants. (R.T. 65-66) The vehicle belonged to the victim (R.T. 11, 63), and its occupants were O'Neil and Runnels. (R.T. 65) At the time of the arrest, the patrol officer had no knowledge of the robbery of the victim. (R.T. 84)

The second policeman, a City of Los Angeles investigating officer, stated that on the morning of February 10, after having obtained custody of O'Neil and Runnels (A. 131), he had a "conversation" with Runnels at the jail where he was being held. (A. 128) The officer testified that he advised Runnels of his rights (A. 129) and "stated to Mr. Runnels that his wife had told me that O'Neil was putting all the blame on him." (A. 137) According to the officer, Runnels then made an oral statement which, as reported by the officer, incriminated Runnels himself and identified O'Neil as the instigator and principal actor in the robbery. (A. 137-39)<sup>2</sup> The officer testified that no one other than Runnels and himself was present at the time of this statement (A. 129), and that no recording of the statement was made. (A. 142) (The officer testified that a second officer was present during a subsequent conversation with Runnels "to the same effect," but that no recording was made of this conversation either (A. 142).)

In anticipation of the officer's testimony, O'Neil's counsel had moved for a severance at the beginning of the trial (A.

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<sup>2</sup>The officer's testimony as to the substance of this statement is reproduced as an appendix to this brief, *infra*, p. 27.

174-176), and he objected to the admission of the testimony at the time it was offered. (A. 130-31) The court rejected both of these efforts to exclude the testimony, relying instead on instructions to the jury that the evidence of a statement by Runnels was not to be considered against O'Neil. (A. 137, 245-46)

Six witnesses appeared for the defense, including O'Neil and Runnels, each of whom took the stand on his own behalf. (R.T. 184, 216) The first witness, who identified herself as the common-law wife of Runnels, stated that the investigating officer informed her on February 11 (the day after the confession was supposed to have been made) that Runnels had as yet given no statement and that he would see that Runnels got only "five to ten" instead of "one to life" if she were to persuade Runnels to make a statement. (R.T. 137)

On both direct examination by his own counsel and cross-examination by the prosecutor, Runnels flatly denied making any statement of any kind to the investigating officer. (A. 150, 164-67) O'Neil's counsel did not examine Runnels. (A. 150)

O'Neil's mother and sister (as well as O'Neil and Runnels themselves) testified that between 9:00 p.m. and 11:00 on the night of February 8, 1965, O'Neil and Runnels were dancing and drinking in the O'Neil home. (R.T. 163, 175-76) O'Neil's mother further testified that the victim of the robbery had subsequently stated to her on the phone that "he wasn't for sure that he had the right boys." (R.T. 176-77)

O'Neil and Runnels both testified that at 11 p.m. on February 8 (one-half hour after the robbery had occurred), they left the O'Neil home together and hitch-hiked a ride in what later turned out to be the victim's car, which was then being driven by a man known to Runnels as "Gary" (A. 146) and to O'Neil as "James Garrett." (R.T. 220)<sup>3</sup>

<sup>3</sup>O'Neil later testified on cross-examination that while he knew how to get to where Garrett lived and had told the police about him, he didn't know the exact address of Garrett's abode and had not tried

According to their testimony, they were driven to the Top Cat Club, where Garrett consented to turn the keys of the car over to O'Neil and Runnels, instructing them to return the vehicle and park it near the Top Cat later that night. (A. 144-49; R.T. 216-24) The defendants' testimony as to the transfer of the car to their possession was corroborated by testimony from a patron of the Top Cat. (R.T. 144-51)

After securing the use of the car, O'Neil and Runnels drove off for Santa Monica, according to their testimony, to visit some girls. (A. 147; R.T. 225) O'Neil and Runnels testified that as they passed through Culver City, O'Neil discovered a gun in the glove compartment of the car while looking for a match. (A. 148, 164; R.T. 225-26) According to their testimony, they at once became "very uneasy" over having a gun for which they had no permit; hence, they turned around to go back to the Top Cat Club, drove into an alley to throw away the gun, and were immediately arrested by the Culver City patrol. (A. 148, 164; R.T. 226-29)

In his argument to the jury, the prosecutor relied on the circumstances of the arrest (A. 183-85) and on the officer's evidence of the Runnels statement (A. 184-86, 219-20) to corroborate the victim's identification (A. 184-86, 219-20). He invited the jury to weigh Runnels' obvious motivation to deny making the statement against the officer's asserted lack of motivation to claim falsely that a statement had been given. (A. 188-89, 223-24) Defense counsel stressed the possibility of a mistaken identification (A. 197-200, 208-11, 216) and relied on the substantial alibi evidence. (A. 206-07, 213-16) As noted above, the jury convicted both defendants on three counts of kidnapping for purposes of robbery, armed robbery and vehicle theft. (A. 103)

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to subpoena him as a witness. (R.T. 238-39) O'Neil further stated that he had been incarcerated since the night of his arrest and had had no opportunity to go by Garrett's residence. (R.T. 251)

## B. SUBSEQUENT PROCEEDINGS

After the judgment of conviction was entered on June 17, 1965, respondent O'Neil appealed to the District Court of Appeals. (A. 103) On March 30, 1967, that court rejected his claim that the trial court had erred in failing to grant him a separate trial free of the prejudice arising from the State's introduction of the officer's testimony about a statement by Runnels. (A. 39-47) Following denials of a petition for rehearing and an application to recall the remittitur, O'Neil sought a writ of habeas corpus from the California Supreme Court on March 7, 1968, urging that the use in his trial of the evidence of a statement by Runnels was constitutional error. (A. 48-65) He expressly relied on the Sixth and Fourteenth Amendments in support of his claim. (A. 60) O'Neil's petition was denied on March 20, 1968. (A. 66)

Thereafter, on April 25, 1968, O'Neil petitioned for a writ of habeas corpus from the U.S. District Court for the Northern District of California. (A. 28) The District Court granted the writ, rejecting California's arguments that the error of admitting evidence of a statement by Runnels was harmless beyond a reasonable doubt and that federal habeas relief should be withheld because O'Neil might have a remedy in the state courts under *Bruton v. United States*, 391 U.S. 123 (1968), which came down during the pendency of the Federal habeas proceeding. (A. 103-07)

The Court of Appeals for the Ninth Circuit affirmed, one judge dissenting (A. 111-26; 422 F.2d 319), and this Court granted California's petition for a writ of certiorari, 400 U.S. 901 (Nov. 9, 1970), appointing the undersigned attorney to represent O'Neil in this Court. (In both the District Court and the Court of Appeals, as in the California Supreme Court, O'Neil appeared *in propria persona*. (A. 2, 5, 65))

## SUMMARY OF ARGUMENT

This case involves a joint criminal trial before a jury in which the State put into evidence a police officer's testimony that an oral statement was made during custodial interrogation by one of the accused, Runnels. As reported in court by the officer, this statement incriminated both Runnels and the other accused, respondent O'Neil. Police testimony as to unrecorded oral accusations by suspected accomplices during in-custody questioning has long been recognized by courts to be at once powerfully damaging and extremely unreliable. Yet California asks this Court to hold that O'Neil's rights under the Confrontation and Due Process Clauses were not violated when such evidence was spread before the jury determining O'Neil's guilt, for the reason that Runnels took the stand and denied having made the statement attributed to him.

The position advanced by California is contrary to *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Bruton v. United States*, 391 U.S. 123 (1968). In those cases the accused's right to be confronted with the witnesses against him was held to be denied not, as California would have it, simply because the allegedly accusing accomplice did not testify, but rather because he did not affirm the accusatory statement in open court before the jury and thereby expose himself to cross-examination by the accused.

Without such an affirmation of the accusation by the person allegedly making it, the accused cannot *cross-examine* his accuser. Analysis of the nature of the cross-examination demonstrates that if the alleged accuser will not affirm his accusation in court, the accused has at most an opportunity to *rebut* the evidence of the accusation. Thus, he may be able to offer the witness's present statement that he did not make the prior statement attributed to him, just as he can offer his own alibi testimony or any other type of evidence in denial that is available to him. But where an accused is incriminated by police testimony as to unrecorded oral accusatory statements reportedly made by a suspected

accomplice during custodial interrogation, the mere opportunity to rebut so inherently unreliable—yet devastating—an accusation is not an adequate substitute for the opportunity to cross-examine one's accusers that is guaranteed by the Sixth and Fourteenth Amendments.

The constitutional error of admitting the police officer's evidence of an accusation of O'Neil by Runnels cannot be said to have been harmless beyond a reasonable doubt. Through the testimony of six different witnesses, O'Neil established a consistent, unshaken alibi defense that placed him and Runnels away from the scene at the time of the offense and provided as explanation for his subsequent arrest in the victim's car. In view of this evidence, and the evidence of circumstances raising the possibility of a mistaken identification, the Court of Appeals correctly held it "more likely than not that Runnels' statement dispelled the doubts of the jury." 422 F.2d at 323.

Finally, since the California courts have had an opportunity on both direct and collateral review to pass on O'Neil's constitutional objections to the evidence of an accusation by Runnels, no basis exists in the doctrine of exhaustion of state remedies for requiring O'Neil to return to the California courts yet another time.

**I. POLICE TESTIMONY AS TO AN UNRECORDED ORAL STATEMENT MADE BY A SUSPECT DURING CUSTODIAL INTERROGATION ACCUSING ANOTHER OF PARTICIPATION IN A CRIME IS INHERENTLY UNRELIABLE, YET DEVASTATING, EVIDENCE OF THE GUILT OF THE ACCUSED PERSON.**

The kind of evidence challenged by respondent O'Neil in this case is one of the most unreliable known to the law; yet it is also one of the most devastating in its impact on the accused. As Justice Harlan has recently noted, English and American courts have for three centuries consistently refused to admit proof of "a confession of an accomplice

resulting from formal police interrogation" as evidence of the guilt of an accused, and such exclusion is "universally accepted." *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) (opinion of Harlan, J.); see *Bruton v. United States*, 391 U.S. 123, 128 n. 3 (1968); *id.* at 138 (concurring opinion of Stewart, J.); *id.* at 141-42 (dissenting opinion of White, J.). The untrustworthiness and devastating effect of such evidence are the necessary starting point for a realistic assessment of whether O'Neil was accorded a constitutionally adequate opportunity to confront and cross-examine his alleged accuser.

The indicia of untrustworthiness attaching to the account of Runnels' reported statement are numerous. First, the alleged statement was admittedly an oral one that was not recorded or otherwise transcribed by the police. The risks of fabrication, distortion or simple error in reporting are manifestly greater in the case of alleged oral statements by suspects than when the statements are recorded or put in writing and signed by the suspect. See *McCormick, Evidence*, 225 n. 2, 238 (1954); also *Bridges v. Wixon*, 326 U.S. 135, 150-51, 153 (1945).

Second, the alleged statement was secured and testified to by a police officer charged with the duty of investigating the offense. Contrary to the assertion of the prosecutor in his argument to the jury, the officer was obviously not a totally objective medium of transmission, since he had a special interest in producing a solution for the reported offense. See *Dist. of Columbia v. Clawans*, 300 U.S. 617, 630-31 (1937); *In re Groban*, 352 U.S. 330, 340-41 (1957) (dissenting opinion of Black, J.). Moreover, only this officer was present when the statement was reportedly given, and only one other officer, who did not testify, was present when it was reportedly repeated.<sup>4</sup>

<sup>4</sup>The United States, in an *amicus* brief urging that States have the power to dispense with "strict confrontation" where reliable out-of-court statements are involved, has nonetheless stated that it "would have grave difficulty with a statute or judicially created rule of evidence which sought to authorize the admission into evidence in the

Third, the reported statement about the crime was made by one who was, according to the officer's testimony, an accomplice in the commission of the offense. The extreme unreliability even of in-court accomplice testimony has long been recognized, and this perception underlies the various special rules relating to accomplice testimony that courts and legislatures have from time to time adopted.<sup>5</sup> The recognition in law of the untrustworthiness of accomplice testimony has been well expressed in the following passage from an opinion of the Court of Appeals for the Fifth Circuit:

"A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony. Cobham's misplaced hope for immunity that helped send Raleigh to the Tower is on the same level with the hope of some narcotic peddler or some other poor

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trial of one conspirator of a confession made *to the police* by another after the conspiracy had terminated." Brief for the United States as Amicus Curiae, *Dutton v. Evans*, Oct. Term 1970, No. 10, p. 32 n. 24 (emphasis in original).

<sup>5</sup> It has long been the custom, both in England and in the United States, for the court not only to caution the jury as to the unusual untrustworthiness of the testimony of an accomplice, but to advise them not to convict on such testimony in the absence of some corroborating evidence. 7 Wigmore, *Evidence*, §2056 (3d ed. 1940); Archbold, *Criminal Pleading*, §1293 (37th ed. 1969); 30 Am. Jur.2d, *Evidence*, §1151; see *Crawford v. United States*, 212 U.S. 183, 204 (1909). In many jurisdictions these rules of practice have been converted into rules of law. 7 Wigmore, *op. cit.*; Archbold, *op. cit.*; see *Cash v. Culver*, 358 U.S. 633, 637 (1959). Many cases are reported in which convictions based on accomplice testimony were reversed for undue restriction of the accused's right to bring out, on cross-examination, facts bearing on the credibility of the accomplice. 3A Wigmore, §967 (Chadbourn rev. ed. 1970); cf. *Alford v. United States*, 282 U.S. 687 (1931). See *On Lee v. United States*, 343 U.S. 747, 757 (1952).

wretch to save *his* skin by laying the entire blame on a friend or close associate." *Phelps v. United States*, 252 F.2d 49 (5th Cir. 1958).

As the foregoing quotation suggests, a fourth indication of the unreliability of Runnels' reported statement about O'Neil is that Runnels was under arrest and facing prosecution at the time he allegedly gave the statement. Under such circumstances, the hope for leniency in return for aiding the state provides the accomplice with a special "incentive to involve others," regardless of the fact or degree of their true involvement. See *Gordon v. United States*, 344 U.S. 414, 421-22 (1953); *Alford v. United States*, 282 U.S. 687, 693 (1931). Indeed, in England the normal suspicion of accomplice testimony incriminating an accused is decisively heightened when the accomplice is, at the time he gives his testimony, subject to criminal proceedings for the offense in question. In such a case it has been lately held that the admission of such testimony, though given in open court by the accomplice himself, requires that the conviction be quashed, notwithstanding the existence of other "overwhelming evidence" against the accused. *Regina v. Pipe*, 51 Crim. App. R. 17 (C.A. 1966); see Archbold, *Criminal Pleading*, § 1297 (37th ed. 1969).

A fifth factor bearing on the unreliability of the alleged statement by Runnels is the extent to which it is, as reported, a self-serving effort by Runnels, not merely to share, but to shift blame for the crime from Runnels and to O'Neil. Although the statement incriminates Runnels, it credits O'Neil with first suggesting the crime and with playing the major role in its execution. See Appendix, *infra*, p. 27. The unreliability of a blame-shifting statement of this type is reflected in the rule of evidence excluding any self-serving parts of an out-of-court statement admitted as a declaration against interest. See McCormick, *Evidence*, § 256 at 553 (1954).

A sixth factor making Runnels' reported statement unreliable evidence of O'Neil's guilt is the fact that it was reported

to have been given during custodial interrogation. In the past this Court has been keenly aware of the danger that incriminating statements may be unreliable when made in "the compelling atmosphere inherent in the process of in-custody interrogation." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). See, e.g., *Alford v. United States*, 282 U.S. 687, 693 (1931). While it has been urged that "the insistent and ever-present force of self-interest" (McCormick, *op. cit. supra*, §109, at 226) can be expected to minimize the dangers of mistake and falsehood in confessions, this observation obviously has no application to in-custody statements that accuse other persons of crime.

Nor is there need to speculate in this case as to the psychological pressures that might have been brought to bear on Runnels during his interrogation. A seventh index of unreliability is the officer's testimony that Runnels' statement was obtained when he was informed that his wife had said that "O'Neil was putting all the blame on him." (A. 137) This testimony indicates that the officer was resorting to a common interrogation technique,<sup>6</sup> one that has received the approval of this Court even when the interrogator's statements about the suspected accomplice's confession or accusation are admittedly false. See *Frazier v. Cupp*, 394 U.S. 731 (1969). Manifestly, however, resort to such a stratagem creates the gravest risk of unreliability insofar as it evokes statements from the suspect incriminating others, for the suspect's natural tendency to share or shift blame will be accentuated by his anger at his supposed betrayer.

Finally, it must be borne in mind that Runnels did deny having made the statement attributed to him, or any other statement, and there was some evidence corroborating this denial. (R.T. 137)

Notwithstanding the unreliability of police testimony as to oral accusations allegedly made by suspects during cus-

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<sup>6</sup>See Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42, 50-51 (1968).

todial interrogation, it is clear that such testimony is "powerfully incriminating" in the eyes of the jury, *Bruton v. United States*, 391 U.S. 123, 135 (1968), and does "inevitable harm" to the defendant named in the accusation. *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (dissenting opinion of Frankfurter, J.). Juries of laymen, unfamiliar with the peculiar dangers of such evidence, unaware of the centuries of judicial hostility to it, cannot be expected to give it only the small weight it deserves; instead they vastly overvalue it. Thus, the rule excluding such evidence from the jury's consideration is "universally accepted." *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) (opinion of Harlan, J.); see *Bruton v. United States*, 391 U.S. 123, 138 (1968) (concurring opinion of Stewart, J.). California now urges, however, that the Constitution places no bar in the way of the abandonment of this salutary rule where the suspect is in court to deny having made the accusations attributed to him by the police. See Pet. Br. at 11, 24.

**II. UNLESS THE REPORTED ACCUSATORY STATEMENT IS AFFIRMED IN COURT BY THE SUSPECT WHO ALLEGEDLY MADE IT, POLICE TESTIMONY AS TO ITS CONTENTS CANNOT BE SPREAD BEFORE THE JURY DETERMINING THE ACCUSED'S GUILT WITHOUT UNCONSTITUTIONALLY DENYING THE ACCUSED HIS RIGHT TO CROSS-EXAMINE HIS ACCUSERS AS GUARANTEED BY THE CONFRONTATION AND DUE PROCESS CLAUSES.**

Notwithstanding the inherent unreliability and devastating impact of the police testimony as to Runnels' alleged accusatory statement, California urges that because Runnels took the stand and denied making any statement, "even the use of his statement as substantive evidence against his co-defendant [O'Neil] is not constitutional error." Pet. Br. at 24; also 11.<sup>7</sup> In California's view, the fact that the

<sup>7</sup>California is forced to this position. *Bruton v. United States*, 391 U.S. 123 (1968) indisputably held that limiting instructions to the jury, such as were given in the instant case, are insufficient to protect

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alleged accuser took the stand and denied making any statement means that the accused had an adequate opportunity to confront and cross-examine his accuser. This position is, however, contrary to the rationale of this Court's Confrontation Clause decisions and will not stand analysis.

The holding of the Court in *Douglas v. Alabama*, 380 U.S. 415 (1965) controls this case, as the court below recognized. (422 F.2d at 321; A. 114) There the petitioner and an alleged accomplice, one Loyd, were tried separately on charges arising out of the same incident. Loyd was tried first and convicted. He was planning to appeal his conviction, however, when he was called as a prosecution witness at the petitioner's trial. Loyd took the stand, but relying on the privilege against self-incrimination, he refused to testify concerning the alleged crime. The State was then allowed to "refresh Loyd's recollection" by reading, in the presence of the jury, Loyd's purported confession incriminating the petitioner as the triggerman in the crime. This Court reversed the petitioner's conviction on the ground that spreading Loyd's out-of-court accusations before the jury denied petitioner his right to cross-examination secured by the Confrontation Clause. In the words of the Court, "Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his." 380 U.S. at 419-20.

The principles of *Douglas* were followed three years later in *Bruton v. United States*, 391 U.S. 123 (1968).<sup>8</sup> That decision, like the case at bar, involved a joint trial in which the prosecution spread before the jury testimony by an investigative officer that during custodial interrogation of

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an accused against the possibility that the jury will consider evidence of his co-defendant's incriminating statements in determining his guilt. And see *Jackson v. Denno*, 378 U.S. 368 (1964).

<sup>8</sup>*Douglas* was decided before O'Neil stood trial, and while *Bruton* was decided after his conviction had become final, it was held retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968).

one of the accused, Evans, he obtained from him an oral statement which, as reported in court by the officer, incriminated not only Evans but also the other accused, Bruton. Evans, by not taking the stand, failed to affirm the statement attributed to him, and relying on *Douglas*, this Court held that *Bruton* was therefore denied his constitutional right of confrontation because of the introduction of Evans' accusations "in a form not subject to cross-examination." 391 U.S. at 127-28.

The case at bar is indistinguishable in principle from *Douglas* and *Bruton*.<sup>9</sup> Runnels, like Loyd and Evans, was in jeopardy for the same offense as his alleged accomplice, respondent O'Neil, and could not affirm his purported earlier statement without gravely endangering his own interests. While Loyd refused to affirm the purported statement by refusing to testify regarding the alleged crime, and Evans failed to admit the statement imputed to him by not taking the stand at all, Runnels refused to affirm the statement attributed to him by unequivocally denying that he had made any statement. The effect on O'Neil stemming from this denial was precisely the same as the effect on the petitioners in *Douglas* and *Bruton*: he was unable adequately to cross-examine his accuser.

It is only by misunderstanding the essential nature of cross-examination that one can assert that O'Neil had an adequate opportunity to cross-examine Runnels on the accusations attributed to him. The effectiveness of cross-examination as a truth-discovering technique may be said to depend upon at least two unique attributes of this means of developing evidence. First is the opportunity which cross-examination affords to elicit further evidence from the witness that qualifies or diminishes the credit of the testi-

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<sup>9</sup>The evidence of Loyd's accusations was somewhat more reliable than that involved here because Loyd's statements were embodied in a written document identified as having been signed by Loyd. (380 U.S. at 416-17)

mony given on direct examination.<sup>10</sup> The second relevant attribute of cross-examination is the critical fact that the evidence elicited on cross-examination has, generally, the same probative value as the evidence developed through the witness on direct examination.<sup>11</sup>

O'Neil's opportunity to question Runnels had neither of these attributes and hence did not amount to an opportunity to cross-examine him on the alleged statement. When Runnels denies having made any statement at all, O'Neil's counsel cannot effectively pursue lines of questioning designed to qualify or impeach the accusatory portions of the reported statement. To develop through Runnels evidence that the accusations in the statement stemmed from, e.g., his anger at O'Neil for apparently "putting all the blame on him" (*supra*, p. 3) is extremely difficult, at best, when Runnels is resistant to any suggestion that he might

<sup>10</sup>See 5 Wigmore, *Evidence*, § 1368, at 33-34 (3d ed. 1940); Busch, *Law and Tactics in Jury Trials*, § 285 at 460 (1949). To the extent that such qualifying or impeaching evidence can as a practical matter be developed only from the witness himself (as where the matters to be explored are peculiarly within his knowledge), "cross-examination is vital, i.e., it does what must be done and what nothing else can do." 5 Wigmore, *op. cit. supra*, at 34.

<sup>11</sup>If the witness's testimony on direct examination (e.g., his accusation of the defendant) is to be credited by the jury, so ordinarily must his testimony on cross-examination (e.g., his recantation, his testimony as to circumstances casting doubt on the truth of the accusation), for both come out of the mouth of the same witness. See 5 Wigmore, *Evidence*, § 1368, at 34 (3d ed. 1940): "[C]hiefly, the advantage is that the cross-examined witness *supplies his own refutation*. . . . If we believed the answers on direct examination, we must also believe the answers on cross-examination." (Emphasis in original.) Likewise, if the witness's testimony on cross-examination is discredited (e.g., by inconsistencies, or by contradiction through other, more credible evidence), then the testimony on direct examination is discredited too, for the same witness affirmed the truth of both. See McCormick, *Evidence*, § 33, § 47 at 102 & n. 17 (1954). Compare the instruction given to the jury in the instant case: "A witness wilfully false in one material part of his or her testimony is to be dis-trusted in others." (A. 242.)

have said anything at all to his interrogators. More critically, it is quite impossible to probe the reported statement for damaging omissions, errors or inconsistencies when its alleged maker will not admit having made it.<sup>12</sup> If, but only if, the statement had been affirmed by Runnels in direct examination, none of these difficulties would have stood in the way of a true cross-examination by O'Neil's counsel.

The fact that O'Neil could not cross-examine Runnels on the alleged statement is seen even more vividly when one considers the total lack of any connection between the probative value of the reported accusation and the probative value of Runnels' denial that he made the accusation. The jury can and will readily discount the defendant Runnels' denial that he made a statement that incriminates himself as well as O'Neil, yet at the same time the jury can and will credit what he reportedly said in that statement about O'Neil.

<sup>12</sup>At this distance it is obviously impossible to imagine all the myriad ways in which genuine cross-examination could have tested the alleged Runnels' statement and perhaps diminished its credibility. One concrete example may be suggestive, however. As reported, the statement says that O'Neil and Runnels went into the Culver City liquor store for the purpose of robbing it but did not do so because too many people were in it. See Appendix, *infra*. Yet the undisputed evidence in the case placed O'Neil and Runnels in the vicinity of the liquor store at approximately 1:00 A.M. on a Tuesday morning, when the store was hardly likely to be crowded, and the liquor store owner, who was reportedly alarmed by O'Neil and Runnels as they drove by in a car, said nothing about them ever entering the store. *Supra*, p. 3. Cross-examination of a witness affirming the alleged statement could have nailed down the details as to how long they were supposedly in the store, who saw them there, what they did in the store, how many other people were in the store, etc. Then, with the witness firmly committed to his story, he might have been dramatically impeached—and his accusation seriously undermined—by defense proof through other witnesses that, e.g., there was only one customer in the liquor store after 12:30 A.M., O'Neil and Runnels never entered the store, etc. See McCormick, *Evidence*, § 47, at 102-03 (1954). (For an account of an equivalent use of cross-examination by Abraham Lincoln in the famous Duff Armstrong case, and for other illustrations, see Busch, *Law and Tactics in Jury Trials*, § 303, at 493-94 (1949).)

The credibility of the reported accusatory statement is equally independent of the credibility of any alibi or other contradictory testimony elicited from Runnels on the stand. Because Runnels does not affirm the accusatory statements attributed to him, it is *not* true (as it would be in a real cross-examination situation) that if we believed the accusatory statements, we must also believe the denial, the alibi and the other in-court testimony of Runnels. Cf. 5 Wigmore, *Evidence*, § 1368 at 34 (3d ed. 1940). Because Runnels has not placed his credibility behind the reported accusatory statements, it is *not* true (as it would be in a true cross-examination situation) that a successful impeachment of his testimony given in response to O'Neil's counsel's questions will also impeach the accusation. Cf. McCormick, *Evidence*, § 47 at 102 & n. 17 (1954). Therefore, the opportunity which O'Neil had to question Runnels was *not* an opportunity to cross-examine him on the alleged accusation.<sup>13</sup>

<sup>13</sup>Two additional factors may be briefly mentioned, further indicating that O'Neil's opportunity to question Runnels was not an opportunity to cross-examine him on his alleged accusation.

(1) The demeanor of a witness is unquestionably important in determining whether his testimony is worthy of belief. *E.g.*, *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). One important function of cross-examination is that it not infrequently succeeds in making a witness "reveal by his demeanor—his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance—that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness." *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967). To the extent that Runnels' demeanor was poor, and were it to have been revealed as such under questioning by O'Neil's counsel, it would not be the reported accusation that the jury would regard as having been undermined, but rather Runnels' denial of that accusation.

(2) Leading questions to a witness are normally forbidden on direct examination but permitted on cross. McCormick, *Evidence*, § 6 at 10 (1954). The nature of the examination which O'Neil's counsel could have made of Runnels is revealed by the authorities supporting the proposition that in the instant case the court could properly have prohibited O'Neil's counsel from asking Runnels leading questions,

Runnels on the stand, before the jury in open court, is not the accuser, and for O'Neil to examine him is not to cross-examine his accuser. O'Neil's accuser—if one there be—is Runnels under custodial interrogation, forever removed from the possibility of cross-examination, forever cloaked in the impenetrable mantle of the police officer's testimony as to what was said and not said at that secret time. The opportunity which O'Neil had to elicit testimony from Runnels contradicting the accusations attributed to him by the police officer was, at most, an opportunity to *rebut* those accusations. This rebuttal opportunity which O'Neil had through Runnels was no substitute for his right to cross-examine his accuser. That is painfully apparent when one considers Runnels' credibility in the case: he stands before the jury "accused side-by-side with the defendant" (*Bruton v. United States*, 391 U.S. 123, 136 (1968)), with every apparent reason of self-interest to deny a statement that incriminates him as well as O'Neil.<sup>14</sup>

*California v. Green*, 399 U.S. 149 (1970) affords no constitutional sanction for the position that an opportunity to rebut an accuser's evidence can, on the facts of the case at bar, substitute for an opportunity to cross-examine the accuser. In *Green* the evidence of out-of-court accusatory statements which this Court held to have been properly admitted was the transcript of a witness' testimony given at a preliminary hearing, subject to full cross-examination by the accused—not a police officer's testimony as to an unrecorded oral accusation made by a suspect during cus-

at least so long as Runnels was unwilling to affirm his accusation of O'Neil. See Busch, *Law and Tactics in Jury Trials*, §306 (1949); also *Mitchell v. United States*, 213 F.2d 951, 954-56 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

<sup>14</sup>The prosecutor in the instant case knew well that he was on safe ground when he addressed the jury in closing argument (A. 223):

"When you say who is telling the truth, you are going to have judge between Officer Traphagen and this defendant, because they both can't be telling you the truth about that statement, whether there was one made or not, and you are going to have to consider who has got the most reason to lie. . . ."

todial interrogation.<sup>15</sup> To the extent that the Court found that the out-of-court statements were admissible because the declarant testified as a witness at the trial, its conclusion was that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the statements*" and thus opens himself to cross-examination on those statements. 399 U.S. at 164 (emphasis supplied).<sup>16</sup>

Nor is the result in *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) any support for California's position in the instant case. There the out-of-court statement was not a detailed, blame-shifting accusation allegedly made in the coercive atmosphere of official interrogation and reported in court by the police interrogator; rather, it was only a single spontaneous remark of doubtful import reported by a fellow prisoner. Lacking the indicia of untrustworthiness and the devastating impact of the accusation in the case at bar, the remark in *Evans* obviously posed a far less serious Confrontation Clause question.

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<sup>15</sup>Such police testimony had also been admitted in *Green*, but this Court did not reach the question of whether that was proper under the Confrontation Clause. See 399 U.S. at 169-70. Even if it had, however, the holding would not have controlled the case at bar, since the witness-suspect "admitted making the statement . . . and insisted that he had been telling the truth as he then believed it . . ." *Id.* at 152.

<sup>16</sup>The significance in *Green* of the witness's affirming the out-of-court statements was emphasized in a brief submitted by the United States as *amicus curiae*, which concluded that where the witness denied making the statement, the accused is unable effectively to test the truth of the allegations that concern him. See Brief for the United States as Amicus Curiae, *California v. Green*, Oct. Term 1969, No. 387, p. 30 & n. 15. (Although the issue was not there discussed, *Harrington v. California*, 395 U.S. 250 (1969) is similarly distinguishable from the case at bar in that the codefendant Rhone affirmed the incriminating statement attributed to him and gave detailed testimony about the contents of transcript of the statement. Record, *Harrington v. California*, Oct. Term 1968, No. 750, at 410-11, 413-16 *et seq.*)

Finally, it may be appropriate to observe that adherence to the principles of *Douglas* and *Bruton* in the instant case will not disrupt or unduly complicate procedures for criminal trials. If in a joint trial situation the state wishes to safeguard its ability to use, whether as part of its case in chief or for impeachment or rebuttal of the defense's evidence, police evidence of a defendant's oral, unrecorded custodial statement involving elements both of confession and of accusation of a co-defendant, then the state can explore with the court whether omitting reference to the accusatory portions of the alleged statement is feasible without prejudicing either defendant, or whether, as is more likely, the defendants should be severed and tried separately.<sup>17</sup>

In the separate trial of the defendant who reportedly made the statement, the evidence of his statement can, if otherwise admissible, be offered to incriminate him. In the separate trial of the defendant who was reportedly accused in that statement, evidence of the statement would be inadmissible, unless it was affirmed in court by its maker, *Douglas v. Alabama*, *supra*, or, perhaps, its maker gave testimony inconsistent with the alleged statement as a witness called by the defense<sup>18</sup> (in which case evidence of the statement, notwithstanding its untrustworthiness, could arguably be used by the prosecution for impeachment). Compare *Harris v. New York*, \_\_\_ U.S. \_\_\_ (Feb. 24, 1971).

<sup>17</sup>This is the procedure already required by *Bruton* (see 391 U.S. at 143-44 (dissenting opinion of White, J.)) and recommended by the American Bar Association Project on Minimum Standards for Criminal Justice. See ABA Standards, *Joinder and Severance*, §2.3(a) (Approved Draft, 1968). (Indeed, the A.B.A. Advisory Committee on the Criminal Trial recommended this procedure in the interests of fairness even before *Bruton* was decided. See *id.* (Tentative Draft, Nov. 1967).)

<sup>18</sup>In the typical joint trial situation, as in the case at bar (*supra*, p. 4), the allegedly accusing codefendant takes the stand on his own behalf and for his own purposes, and not at the behest of the accused defendant.

**III. THE CONSTITUTIONAL ERROR OF LAYING THE POLICE OFFICER'S EVIDENCE OF RUNNELS' UNAFFIRMED ACCUSATION OF O'NEIL BEFORE THE JURY CHARGED WITH DETERMINING O'NEIL'S GUILT CANNOT, ON THIS RECORD, BE SAID TO HAVE BEEN HARMLESS BEYOND A REASONABLE DOUBT; NOR WOULD ANY POLICY UNDERLYING THE DOCTRINE OF EXHAUSTION OF REMEDIES BE SERVED BY REQUIRING O'NEIL TO PRESENT THIS CLAIM OF ERROR TO THE STATE COURTS YET ANOTHER TIME.**

**A. Harmless Error**

California's efforts to secure reversal of the decision below on grounds of harmless error or lack of exhaustion are not convincing. The argument that admitting the police testimony as to Runnels' purported accusation of O'Neil was harmless error is predicated upon the erroneous premise that such error can be harmful "only if the co-defendant's confession has a devastating impact upon the non-confessing defendant's defense." (Pet. Br. at 25) But to require the victim of constitutional error to show that it had a "devastating impact" on his defense is to stand the test of harmless error exactly on its head.

The proper standard of harmless error is the one announced by this Court in *Chapman v. California*, 386 U.S. 18 (1967), and applied in *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, the Court reaffirmed the *Chapman* standard that:

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."  
395 U.S. at 251, citing 386 U.S. at 24.

While it may be that *Harrington* also approved a substantially similar "overwhelming evidence" test,<sup>19</sup> it is clear that

<sup>19</sup>At the end of its opinion in *Harrington*, the Court noted that the evidence of guilt separate from that admitted in error was "so overwhelming that unless we say that no violation of *Bruton* can con-

*Harrington* established no rule that a violation of the Confrontation Clause must be considered harmless unless it can be shown that the erroneously admitted evidence had "a devastating impact" upon the defendant's case.<sup>20</sup>

Under the proper harmless error standard, the erroneous admission of the police testimony as to Runnels' alleged statement cannot be said to have been harmless. No part of the State's case against O'Neil had escaped substantial challenge. Through the testimony of six different witnesses, O'Neil established a consistent, unshaken alibi defense that both placed him and Runnels away from the scene at the time of the offense and provided an explanation for his subsequent arrest in the victim's car. *Supra*, pp. 4-5. Moreover, there was evidence of circumstances raising the possibility of a mistaken identification by the victim,<sup>21</sup> and in his closing argument to the jury the prosecutor relied heavily

stitute harmless error, we must leave this state conviction undisturbed." 395 U.S. at 254. See Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 819 (1970).

<sup>20</sup>Of the nearly two dozen Court of Appeals cases subsequent to *Harrington* that have applied the harmless error doctrine to *Bruton* claims, respondent has not found a single decision holding that *Bruton* error is harmful only if a "devastating impact" is shown. Without exception these decisions have read *Harrington* as reaffirming the *Chapman* "beyond a reasonable doubt" standard, or, at the least, as sanctioning the equivalent "overwhelming evidence" test. *E.g.*, *Alley v. United States*, 426 F.2d 877, 880-81 (8th Cir. 1970). The Court of Appeals cases cited by petitioner are, with one exception, pre-*Harrington*; only one, *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968), *cert. denied* 395 U.S. 958 (1969), *reh. denied* 396 U.S. 869 (1969), even begins to suggest a "devastating impact" test, and only then in an elliptic alternative holding. The one post-*Harrington* Court of Appeals case cited by petitioner, *United States v. Carlson*, 423 F.2d 431 (9th Cir.), *cert. denied* 400 U.S. 847 (1970), like the plurality opinion in *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) and most of the remainder of petitioner's Court of Appeals cases, deals with the scope of the *Bruton* principle in the first instance, not with the appropriate harmless error standard to apply once a *Bruton* violation has been found.

<sup>21</sup>This evidence was summarized in closing argument by O'Neil's counsel at A. 208-11.

upon the evidence of the alleged Runnels statement to corroborate the victim's identification. *Supra*, p. 5). (By contrast, in *Harrington* the improperly admitted confessions of two co-defendants added nothing to the overwhelming evidence of the other witnesses, including Harrington himself. See 395 U.S. at 253-54.)

With the evidentiary record in this condition, the Court of Appeals correctly concluded that it was "more likely than not that Runnels' statement dispelled the doubts of the jury." (422 F.2d at 323; A. 118)

### B. Exhaustion

California's exhaustion argument (Pet. Br. at 28-29) appears to be largely *pro forma*, perhaps because petitioner would like to have a definitive resolution of the recurring practical question which it has brought to this Court. In any event, there is no basis for quarreling with the conclusion of the Court of Appeals herein that the interests of comity between state and federal judicial systems, as well as fairness to the prisoner O'Neil, are best served by passing upon his claim and not requiring him to take it once again to the state courts. (422 F.2d at 323-24; A. 119-21) California's contrary view is evidently based on the notion that *Bruton v. United States*, 391 U.S. 123 (1968) created "new constitutional standards" (Pet. Br. at 29), thus requiring the termination of O'Neil's on-going federal habeas proceeding and a further application by him to the state courts.<sup>22</sup>

Passing the question of whether any such Procrustean rule of further exhaustion is in fact applied in the federal courts (compare *Pope v. Harper*, 407 F.2d 1303 (9th Cir. 1969) with *United States ex rel. Walker v. Fogliani*, 343 F.2d 43

<sup>22</sup>*Bruton* was decided on May 20, 1968, and *Roberts v. Russell*, 392 U.S. 293, holding *Bruton* retroactive, came down on June 10, 1968. O'Neil's federal habeas proceeding had commenced on April 25, 1968. (A. 28)

(9th Cir. 1965)), or if such a rule is applied, whether it ought to be (see Note, *Developments In the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1101-02 (1970)), it is clear that it has no application to the instant case. *Bruton* did not give O'Neil a "new" federal ground for relief—it merely furnished additional authority in support of the claim under the Sixth and Fourteenth Amendments that he had already presented to the state courts. *Supra*, p. 6. O'Neil stood trial after *Pointer v. Texas*, 380 U.S. 400 (1965) and *Douglas v. Alabama*, 380 U.S. 415 (1965) had established his rights under the Confrontation Clause,<sup>23</sup> and after *Jackson v. Denno*, 378 U.S. 368 (1964) had made it clear that limiting instructions to the jury would be insufficient to prevent invasion of those rights.<sup>24</sup> The fact that it subsequently became possible for O'Neil to cite *Bruton* as additional support for his objection to the police evidence of Runnels' alleged statement is no reason for sending him back to the state courts to present exactly the same constitutional claim yet another time. See *Anderson v. Nelson*, 390 U.S. 523 (1968); *Roberts v. LaVallee*, 389 U.S. 40 (1967).

<sup>23</sup>*Douglas* and *Pointer* came down on April 5, 1965; O'Neil's trial commenced on May 13, 1965. (A. 170)

<sup>24</sup>The California Supreme Court first considered the relevance of *Jackson*, *Pointer* and *Douglas* to cases such as O'Neil's more than two years before it denied O'Neil's habeas petition. See *People v. Aranda*, 63 Cal.2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965), cited in *Bruton v. United States*, *supra*, at 130-31.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX

[Testimony of Officer Russell M. Traphagen relating the substance of the conversation which he testified to having with Runnels, A. 137-139:]

He stated that O'Neil had come to his place on the afternoon of the 9th. [\*]

He stated O'Neil asked him if he wanted to make a couple of hits.

He stated that he told O'Neil yes, he would.

He stated that they then went down to the Better Foods Market at the corner of Santa Barbara and Western Avenue.

He stated that O'Neil gave him \$16.

He stated they went inside the market.

I asked him if they had attempted to hold up the market.

He stated they had not.

He stated they then went outside to the parking lot of the market where they observed this man in a white Cadillac.

He stated that O'Neil had the gun; that O'Neil went up to the driver on the passenger side of the vehicle, ordered the man in the car to sit where he was; that he got in the back of the vehicle—referring to Runnels.

He stated that they made this man drive them over on St. Andrews Place to a certain location; that they then made the man get out of the vehicle after robbing him.

He stated that he then drove the vehicle, the Cadillac, and that they then went to Culver City.

He stated that they had gotten out of the vehicle in Culver City and gone to this liquor store.

He stated they went into the liquor store.

\* \* \* \* \*

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\*The witness subsequently amended this date to the 8th of February. (A. 140)

He stated that they then left the liquor store because there were too many people there.

They went back on down to the front of the liquor store. There were still too many people in there.

He stated that they then circled the block a few times, at which time the Culver City Police Department arrested them.

\* \* \* \* \*

He stated there were too many people in the liquor store at the time, and they were waiting for less customers and less people to be in the liquor store, and they were going to go back and rob it.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 290 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

### NELSON, WARDEN v. O'NEIL

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 336. Argued March 24, 1971—Decided June 1, 1971

Respondent and one Runnels were charged with committing various crimes and at their joint trial offered an alibi defense. A police officer testified that Runnels had orally admitted the crimes and implicated respondent. Runnels, who took the stand, denied making the statement. The trial judge ruled that Runnels' alleged statement was inadmissible hearsay as to respondent and could not be considered by the jury in deciding whether respondent was guilty. Respondent also took the stand on his own behalf and gave the same version of their activities as Runnels. Both defendants were found guilty, and after unsuccessful efforts to have his conviction set aside, respondent applied for habeas corpus relief. The District Court ruled that respondent's conviction was improper under *Bruton v. United States*, 391 U. S. 123, and *Roberts v. Russell*, 392 U. S. 293, which held that the Confrontation Clause of the Sixth Amendment as made applicable to the States by the Fourteenth is violated where a codefendant's out-of-court hearsay statement is admitted into evidence without the declarant's being available at trial for "full and effective" cross-examination by the defendant, and that a cautionary instruction to the jury does not adequately protect the defendant where the codefendant does not testify. The Court of Appeals affirmed, stressing that effective confrontation of a witness who has allegedly made an out-of-court statement implicating the defendant was possible only if the witness affirmed the statement as his. *Held*: Where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and testifies in the defendant's favor, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments and in the circumstances of this case respondent, who would

Syllabus

have encountered greater difficulty had Runnels affirmed the statement as his, was denied neither the opportunity nor the benefit of fully and effectively cross-examining Runnels. *Bruton*, *supra*, distinguished. Pp. 4-7.

422 F. 2d 319, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined. MARSHALL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 336.—OCTOBER TERM, 1970

Louis S. Nelson, Warden, Petitioner, v. Joe J. B. O'Neil.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
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[June 1, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Joe O'Neil, was arrested along with a man named Runnels when the police of Culver City, California, answered a midnight call from a liquor store reporting that two men in a white Cadillac were suspiciously cruising about in the neighborhood. The police responded to the call, spotted the Cadillac, and followed it into an alley where a gun was thrown from one of its windows. They then stopped the car and apprehended the respondent and Runnels. Further investigation revealed that the car had been stolen about 10:30 that night in Los Angeles by two men who had forced its owner at gunpoint to drive them a distance of a few blocks and then had robbed him of \$8 and driven off. The victim subsequently picked Runnels and the respondent from a lineup, positively identifying them as the men who had kidnaped and robbed him.

Arraigned on charges of kidnaping, robbery, and vehicle theft, both the respondent and Runnels pleaded not guilty, and at their joint trial they offered an alibi defense. Each told the same story: they had spent the evening at the respondent's home until about 11 p. m., when they had left together. While waiting at a bus

stop they were picked up by a friend driving a white Cadillac, and he offered to lend them the car for a few hours while he went into a night club. They accepted the offer, and once on their way discovered that there was a gun in the glove compartment. They entered an alley in search of a place to dispose of the gun, since they were afraid of being stopped with it in the car. Soon after throwing the gun out of the window they were stopped by the police and arrested. The supposed friend was not called as a witness and was not shown to be unavailable, but other witnesses corroborated parts of their alibi testimony.

The owner of the white Cadillac made a positive in-court identification of the defendants, and a police officer testified to the facts of the arrest. Another police officer testified that after the arrest Runnels had made an unsworn oral statement admitting the crimes and implicating the respondent as his confederate. The trial judge ruled the officer's testimony as to the substance of the alleged statement admissible against Runnels, but instructed the jury that they could not consider it against the respondent. When Runnels took the stand in his own defense, he was asked on direct examination whether he had made the statement, and he flatly denied having done so. He also vigorously asserted that the substance of the statement imputed to him was false. He was then intensively cross-examined by the prosecutor, but stuck to his story in every particular. The respondent's counsel did not cross-examine Runnels, although he was, of course, fully free to do so. The respondent took the stand on his own behalf and told a story identical to that of Runnels as to the activities of the two on the night in question. Both the prosecutor and Runnels' counsel discussed the alleged confession in their closing arguments to the jury, and the trial judge repeated his instruction that it could be considered only against Runnels.

The jury found both defendants guilty as charged. After unsuccessful efforts to set aside the conviction in the California courts, the respondent applied for federal habeas corpus relief in the United States District Court for the Northern District of California, and while the case was pending there this Court decided *Bruton v. United States*, 391 U. S. 123, and *Roberts v. Russell*, 392 U. S. 293, holding that under certain circumstances the Confrontation Clause of the Sixth Amendment,<sup>1</sup> applicable to the States through the Fourteenth,<sup>2</sup> is violated when a codefendant's confession implicating the defendant is placed before the jury at their joint trial.<sup>3</sup> The District Court ruled that the respondent's conviction must be set aside under *Bruton* and *Roberts*, and the Court of Appeals for the Ninth Circuit affirmed. 422 F. 2d 319 (CA9 1970). California then sought a writ of certiorari in this Court, contending, first, that there was no constitutional error under *Bruton* and *Roberts*, second, that any error there might have been was harmless beyond a reasonable doubt under the doctrine of *Chapman v. California*, 386 U. S. 18, and, third, that the District Court should have required the respondent first to seek redress in the state courts, which had had no opportunity to consider the *Bruton* claim. We granted certiorari to consider these issues. 400 U. S. 901. Since we agree with the petitioner that there was no violation of the Constitution in this case, it is unnecessary to consider the other questions presented.

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<sup>1</sup> The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

<sup>2</sup> See *Pointer v. Texas*, 380 U. S. 400; *Douglas v. Alabama*, 380 U. S. 415.

<sup>3</sup> *Roberts v. Russell*, 392 U. S. 293, held that the decision in *Bruton v. United States*, 391 U. S. 123, is applicable to the States and is to be applied retroactively.

Runnels' out-of-court confession implicating the respondent was hearsay as to the latter, and therefore inadmissible against him under state evidence law. The trial judge so ruled, and instructed the jury that they must not consider any part of the statement in deciding whether or not the respondent was guilty. In *Bruton*, however, we held that, quite apart from the law of evidence, such a cautionary instruction to the jury is not an adequate protection for the defendant where the codefendant does not take the witness stand. We held that where the jury hears the codefendant's confession implicating the defendant, the codefendant becomes in substance, if not in form, a "witness" against the defendant. The defendant must constitutionally have an opportunity to "confront" such a witness. This the defendant cannot do if the codefendant refuses to take the stand.

It was clear in *Bruton* that the "confrontation" guaranteed by the Sixth and Fourteenth Amendments is confrontation *at trial*—that is, that the absence of the defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial. This was confirmed in *California v. Green*, 399 U. S. 149, where we said that "[v]iewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.*, at 158. Moreover, "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." *Id.*, at 162. This is true, of course, even though the declarant's out-of-court statement is hearsay as to the defendant, so that its admission against him, in the absence of a cautionary

instruction, would be reversible error under state law. The Constitution as construed in *Bruton*, in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for "full and effective" cross-examination.

The question presented by this case, then, is whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false.

In affirming the District Court, the Court of Appeals relied heavily on the dictum of this Court in *Douglas v. Alabama*, 380 U. S. 415, 420, that "effective confrontation" of a witness, who has allegedly made an out-of-court statement implicating the defendant, "was possible only if [the witness] affirmed the statement as his." The Court in that case also remarked that the witness "could not be cross-examined on a statement imputed to but not admitted by him." *Id.*, at 419. Of course, a witness *can* be cross-examined concerning a statement not "affirmed" by him, but this dictum from *Douglas* was repeated in *Bruton*, *supra*, at 127. In *Douglas* and *Bruton* (and in the other confrontation cases before *Green*)<sup>4</sup> there was in fact no question of the effect of an affirmation or denial of the incriminating statement, since the witness or codefendant was in each case totally unavailable at the trial for any kind of cross-examination. The specific holding of the Court in *Bruton* was:

"Plainly, the introduction of [the codefendant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not sub-

<sup>4</sup> *Brookhart v. Janis*, 384 U. S. 1; *Barber v. Page*, 390 U. S. 719; *Roberts v. Russell*, 392 U. S. 293; *Harrington v. California*, 395 U. S. 250.

ject to cross-examination, since [the codefendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation." 391 U.S., at 127-128.

This Court has never gone beyond that holding.

In *California v. Green*, *supra*, the defendant was accused of furnishing marihuana to a minor, partly on the basis of an unsworn statement, not subject to cross-examination, made by the minor himself while he was under arrest for selling the drug. When the minor, not a codefendant, took the stand at the defendant's trial, he claimed that he could not remember any of the incriminating events described in his out-of-court statement, although he admitted having made the statement and claimed that he believed it when he made it. The earlier statement was then introduced in evidence to show the truth of the matter asserted, and this Court held it admissible for that purpose. The circumstances of *Green* are inverted in this case. There, the witness affirmed the out-of-court statement but was unable to testify in court as to the underlying facts; here, the witness, Runnels, denied ever making an out-of-court statement but testified at length, and favorably to the defendant, concerning the underlying facts.

Had Runnels in this case "affirmed the statement as his," the respondent would certainly have been in far worse straits than those in which he found himself when Runnels testified as he did. For then counsel for the respondent could only have attempted to show through cross-examination that Runnels had confessed to a crime he had not committed, or, slightly more plausibly, that those parts of the confession implicating the respondent were fabricated. This would, moreover, have required an abandonment of the joint alibi defense, and the production of a new explanation for the respondent's presence with Runnels in the white Cadillac at the time of their

arrest. To be sure, Runnels might have "affirmed the statement" but denied its truthfulness, claiming, for example, that it had been coerced, or made as part of a plea bargain. But cross-examination by the respondent's counsel would have been futile in that event as well. For once Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony. If the jury were to believe that the statement was false as to Runnels, they could hardly conclude that it was not false as to the respondent as well.

The short of the matter is that, given a joint trial and a common defense, Runnels' testimony respecting his alleged out-of-court statement was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had Runnels "affirmed the statement as his." It would be unrealistic in the extreme in the circumstances here presented to hold that the respondent was denied either the opportunity or the benefit of full and effective cross-examination of Runnels.

We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments. Accordingly, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

*It is so ordered.*



# SUPREME COURT OF THE UNITED STATES

No. 336.—OCTOBER TERM, 1970

Louis S. Nelson, Warden, Petitioner, v. Joe J. B. O'Neil.	} On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
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[June 1, 1971]

MR. JUSTICE HARLAN, concurring.

I join in the opinion and judgment of the Court. I would, however, go further and hold that, because respondent's conviction became final before this Court decided *Bruton v. United States*, 391 U. S. 123 (1968), he cannot avail himself of that new rule in subsequent federal habeas corpus proceedings. See *Mackey v. United States*, — U. S. —, — (1971) (separate opinion of this writer).

It is difficult to fathom what public policy is served by opening the already overcrowded federal courts to claims such as these. Respondent's trial and appeals were, at the time they occurred, conducted in a manner perfectly consistent with then prevailing constitutional norms. A reversal of the conviction now would either compel the State to place an already once-tried case again on its criminal docket, to be retried on substantially the same (but now more stale) evidence or else force the State to forgo its interest in enforcing in this instance its criminal laws relating to kidnaping, robbery, and car theft because of the disappearance of evidence. Conversely, if federal habeas relief is denied on the merits, as it now is by this Court, the energies of the federal courts have been expended to no good purpose.

To justify such a serious interference with the State's powers to enforce its criminal law and the ability of

federal courts to provide full, fair, and prompt hearings to those who have no other forum available should require the presence of a most substantial countervailing societal interest. But what interest is conceivably promoted by further adjudication of the contentions respondent urges upon us? Surely, indulging his claims does not serve the function of assuring that state courts properly apply governing constitutional standards. For this is precisely what the California courts did in this case. See, e. g., *Delli Paoli v. United States*, 352 U. S. 232 (1957). Nor can it plausibly be argued that we perceive in this case serious issues as to whether respondent was in fact likely innocent of the crime for which he was convicted or whether he was subjected to an intolerable abuse of the prosecutorial function that rendered his trial fundamentally unfair.

The only rationale I can imagine that might support entertaining *Bruton* claims in federal habeas proceedings brought by state prisoners whose convictions had become final prior to the decision in *Bruton* and who had a full and fair opportunity to litigate their claims at trial and on appeal, is the notion that *Bruton* is somehow an unimpeachably correct decision, so infallibly just that other earlier decisions inconsistent with it must be treated as though they had never been made. Even were this a tenable position, the fact is, as the Court notes, that respondent is actually seeking an extension of the *Bruton* holding. More importantly, for me such an "infallibility" argument could rest on nothing more than the fanciful notion that perception of ultimate constitutional verity is always to be found in those who "came after" to this Court.

Such a drastic disruption of judicial processes and alteration of our traditional federal-state balance should be supported by more persuasive considerations than those which led the Court in *Roberts v. Russell*, 392 U. S. 293

(1968), to hold the *Bruton* rule fully "retroactive" in application. I venture to repeat what I stated earlier this Term in *Mackey, supra*:

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." — U. S., at —.

I think it unfortunate that substantial federal judicial energies have been expended, for virtually no purpose at all, on the adjudication of this habeas proceeding. The Court having decided to address the merits of respondent's contentions, however, I unreservedly join in its resolution of them.



# SUPREME COURT OF THE UNITED STATES

No. 336.—OCTOBER TERM, 1970

Louis S. Nelson, Warden,  
Petitioner,  
v.  
Joe J. B. O'Neil.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Ninth Circuit.

[June 1, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

With all deference, I think the Court asks and answers the wrong question in this case. Under the law of California at the time of respondent's trial, admissions to a police officer by a criminal defendant after his arrest could not be used as substantive evidence against other defendants, whether or not the declarant testified at trial.<sup>1</sup> The question with which we are faced is not, therefore, whether the Sixth Amendment would forbid California from using Runnels' statement as substantive evidence against respondent O'Neil if it chose to do so. California rejected that choice: the jury in the present case was explicitly instructed that Runnels' statement could not be considered as evidence against O'Neil. The question, therefore, is whether California, having determined for whatever reason that the statement involved in this case was inadmissible against respondent, may nevertheless present the statement to the jury that was to decide respondent's guilt, and instruct that jury that it should not be considered against respondent. I think our cases compel the conclusion that it may not.

<sup>1</sup> See *People v. Aranda*, 63 Cal. 2d 518, 407 P. 2d 265 (1965); *People v. Roberts*, 40 Cal. 2d 483, 254 P. 2d 501 (1953). The California Evidence Code, presently in effect, did not become operative until January 1, 1967.

In *Bruton v. United States*, 391 U. S. 123 (1968), we reviewed a federal trial in which the extrajudicial confession of one Evans, which implicated both Evans and Bruton in the crime charged, was set before the jury along with instructions that it could be considered as evidence only against Evans. Evans himself did not testify. We held, first, that the Sixth Amendment in those circumstances forbade the use against Bruton of Evans' statement; and second, that since there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," the Sixth Amendment required that Bruton's conviction be reversed. *Id.*, at 126.

Shortly thereafter, we made clear that the second prong of our holding in *Bruton*—that instructing juries not to use one defendant's admissions against the other could not, in fact, prevent them from making such a use—had a constitutional basis.<sup>2</sup> In *Roberts v. Russell*, 392 U. S. 293 (1968), we reviewed a state criminal trial presenting facts substantially identical to those presented in *Bruton*. Roberts and one Rappe had been jointly tried on charges to which Rappe had confessed to a police officer. Rappe's confession implicated both himself and Roberts; it was presented to the jury together with instructions that Rappe's extrajudicial statements could be considered as evidence only against Rappe, and not against Roberts. As in *Bruton*, we reversed. *Roberts v. Russell*, therefore, must stand for the proposition that as a constitutional

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<sup>2</sup> This point was explicitly made in *Bruton* itself by Mr. Justice STEWART:

"[C]ertain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the judge might give." 391 U. S., at 138 (concurring opinion) (emphasis in original).

matter, the risk that a jury will not follow instructions to disregard the statements of one codefendant against another is too great to tolerate in a criminal trial. For as we pointed out in *Bruton*, "If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculcating the nonconfessor." 391 U. S., at 126.

*Bruton* and *Roberts*, therefore, compel the conclusion that the Federal Constitution forbids the States from assuming that juries can follow instructions which tell them to wipe their minds of highly damaging, incriminating admissions of one defendant which simultaneously incriminate another defendant whose guilt or innocence the jury is told to decide. In the present case, California itself has made the judgment that, although Runnels did take the stand, his extrajudicial statements could not be considered by the jury as evidence against petitioner. Under *Bruton* and *Roberts*, California having made the determination that Runnels' statement could not be considered as evidence against O'Neil may not subvert its own judgment in some but not all cases by presenting the inadmissible evidence to the jury and telling the jury to disregard it. For the inevitable result of this procedure is that, in fact, different rules of evidence will be applied to different defendants depending solely upon the fortuity of whether they are jointly or separately tried. This is a discrimination that the Constitution forbids.

Accordingly, I would affirm the judgment below. In no event, however, would I reach the question decided by the Court in this case. For if we assume that the jury did follow its instructions to disregard Runnels' statement against petitioner, his complaint is obviously without foundation. If we assume that they did not,

we still need not reach the question whether California could constitutionally allow Runnels' statements to be used as evidence against petitioner, for California has not purported to do so.<sup>3</sup> Having made that judgment, California is bound to apply it to all defendants or to none. I dissent.

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<sup>3</sup> See n. 1, *supra*.

# SUPREME COURT OF THE UNITED STATES

No. 336.—OCTOBER TERM, 1970

Louis S. Nelson, Warden, Petitioner, v. Joe J. B. O'Neil.	} On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
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[June 1, 1971]

MR. JUSTICE MARSHALL, dissenting.

This case dramatically illustrates the need for the adoption of new rules regulating the use of joint trials. Here there is no question that Runnels' alleged statement to the police was not admissible under state law against O'Neil. But as my Brother BRENNAN points out and as this Court recognized in *Bruton v. United States*, 391 U. S. 123 (1968), there is a very real danger that the statement was in fact used against O'Neil.

Those that argue for the use of joint trials contend that joint trials, although often resulting in prejudice to recognized rights of one or more of the codefendants, are justified because of the savings of time, money, and energy that result. But as this case shows much of the supposed savings is lost through protracted litigation that results from the impingement or near impingement on a codefendant's rights of confrontation and equal protection.

The American Bar Association's Project on Minimum Standards for Criminal Justice, Advisory Committee on the Criminal Trial, suggested that if a defendant in a joint trial moves for a severance because the prosecutor intends to introduce an out-of-court statement by his codefendant that is inadmissible against the moving defendant then the trial court should require the prosecutor to election between a joint trial in which the statement

is excluded, a joint trial at which the statement is admitted but the portion that refers to the moving defendant is effectively deleted, and severance.\* I believe that the adoption of such a practice is the only way in which the recurring problems of confrontation and equal protection can be eliminated.

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\*Section 2.3 of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance provides:

"Severance of defendants.

"(a) when a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

"(i) a joint trial at which the statement is not admitted into evidence;

"(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or

"(iii) severance of the moving defendant."